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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL and the PYRAMID COMPANIES,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Section 404 of the Clean Water Act and its regulations allow the Army Corps of Engineers to issue permits for dredge and fill activities in wetlands where no practicable alternative site "is available." In this case, the Corps issued a permit, finding that no alternative site was available at the time of permit review. EPA vetoed the permit on the ground that an alternative was available to the applicant when it "entered the market."

The question for this Court is whether the Second Circuit erred in upholding EPA's "market entry" theory of practicable alternatives where the theory provides no standard to guide the regulated community, is inconsistent with the purpose of the Act and the language of the regulations, overrides determinations of state and local officials, and contradicts the settled practice of the Corps of Engineers?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the Petitioners, John A. Bersani, Newport Galleria Group, Robert J. Congel and the Pyramid Companies, and the Respondents, United States Environmental Protection Agency, United States Army Corps of Engineers, Lee Thomas, in his official capacity as Administrator of the United States Environmental Protection Agency, Richard K. Dawson, in his official capacity as Assistant Secretary for Civil Works, United States Army, and Jennifer Joy Wilson, in her official capacity as Assistant Administrator for External Affairs, United States Environmental Protection Agency.

Joseph Robichaud and Citizens in Support of Attleboro Mall intervened on behalf of Petitioners in the court below. Sierra Club, Environmental Defense Fund, National Wildlife Federation, National Audubon Society, Conservation Law Foundation of New England, Inc., Massachusetts Audubon Society, Citizens for Responsible Environmental Management, Massachusetts Society for Conservation Professionals, Audubon Society of Rhode Island, Rhode Island Association of Conservation Commissioners and Natural Resources Defense Council intervened on behalf of Respondents in the courts below.

The caption of the Second Circuit's opinion is incorrect because it lists Intervenors Robichard and Citizens in Support of Attleboro Mall and the Homebuilding Association of Massachusetts as parties adverse to Petitioners, when, in fact, these parties intervened on behalf of Petitioners. The Homebuilding Association of Massachusetts did not appeal the dis-

trict court's decision. Petitioners have correctly captioned the case, *John A. Bersani, Newport Galleria Group, Robert J. Congel and the Pyramid Companies v. United States Environmental Protection Agency, et al.*, for this Petition for Certiorari.

Pursuant to Rule 28.1 of the Supreme Court Rules, Petitioners Newport Galleria Group and the Pyramid Companies submit the following information:

> Petitioner Newport Galleria Group is a general partnership, none of whose partners is a corporation. Pyramid Companies is an association of related partnerships, none of whose partners is a corporation.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners John A. Bersani, Newport Galleria Group, Robert J. Congel and the Pyramid Companies respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on June 8, 1988, rehearing and suggestion for rehearing *en banc* denied, September 2, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, with the dissenting opinion of Judge Pratt, (App. A), is reported at 850 F.2d 36 (2d Cir. 1988).

The Order of the United States Court of Appeals for the Second Circuit, denying Petitioners' Petition for a Rehearing and Suggestion for Rehearing *En Banc*, (App. D), dated September 2, 1988, is not reported. The opinion of the United States District Court for the Northern District of New York, (App. B), is reported at 674 F. Supp. 405 (N.D.N.Y. 1987). The Final Determination of the Assistant Administrator for External Affairs, United States Environmental Protection Agency, Concerning the Sweedens Swamp Site in Attleboro, Massachusetts Pursuant to Section 404(c) of the Clean Water Act ("Final Determination"), (App. C), dated May 13, 1986, is not reported.

JURISDICTION

The Petitioners brought suit in the United States District Court for the Northern District of New York, invoking federal jurisdiction pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. § 702. The Second Circuit denied Petitioners' petition for rehearing on September 2, 1988. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory provision, Section 404 of the Clean Water Act ("the Act"), 33 U.S.C. § 1344, is reproduced in the Appendix (App. E), as is the key regulatory provision, 40 C.F.R. § 230.10(a), (App. F).

STATEMENT OF THE CASE

A. Introduction

This case presents an issue that is critical to the administration of a permit program jointly administered by the United States Army Corps of Engineers (the "Corps") and the United States Environmental Protection Agency ("EPA" or the "Agency"), under Section 404 of the Clean

Water Act ("CWA" or "the Act"). Section 404(a) of the Act authorizes the Corps to issue permits for the discharge of dredged or fill material into the Nation's waters if the proposed project satisfies regulations promulgated by EPA and the Corps pursuant to Section 404(b). Under the Section 404(b) regulations, no permit will be issued if a practicable alternative site "is available" to the applicant. Section 404(c) authorizes EPA to veto a Corps-issued permit to protect certain environmental interests.

In this case, the Corps found that no alternatives were available to the Petitioner at the time of permit review and decided to issue a permit. EPA determined, however, in a departure from settled administrative practice, that availability of alternatives should be judged as of the time the applicant "entered the market" and, applying that theory, vetoed the applicant's project.

As Judge Pratt observed in dissent below, the market entry theory "approaches a sensitive environmental problem through a time warp, it ignores the statute's basic purpose, and it creates unfair and anomalous results." 850 F.2d at 48; App. A 25a.

In addition, the theory establishes a standardless inquiry that virtually invites arbitrary and unequal application. It makes no sense in the real world of land use planning, financing and development, and it severely erodes the ability of public facilities planners, state and local land use planners and private investors to make reasoned judgments in carrying out their responsibilities.

Moreover, the theory contradicts the practice and understanding of the Corps, which, as the permitting authority under the Act, is the agency most intimately involved in administering the relevant regulations. It is also contrary to the language of the regulations and to EPA's own previous interpretation of those regulations. If left uncorrected, the Second Circuit's adoption of EPA's "market entry" theory as the only correct understanding

of the regulations will throw what had previously been settled administrative practice of permit review into a state of irremediable confusion.

B. The Statutory And Regulatory Framework

The Clean Water Act prohibits the discharge of any pollutant, including dredged or fill materials, into the Nation's waters, including wetlands, except in compliance with the Act. CWA § 301(a), 33 U.S.C. § 1311(a). Section 404 is an exception to the Act's general prohibitions. It establishes a permit program under which the Corps may authorize discharges of dredged and fill materials in certain circumstances. CWA § 404, 33 U.S.C. § 1344. The program regulates a vast array of activities, ranging from the construction of a tennis court in a homeowner's backyard to construction of new residential subdivisions, office parks, and shopping malls to large public construction projects involving, for example, highways, port improvements, public marinas, parks, public housing, schools and colleges. The Corps administers the program and reviews approximately 14,000 individual permit applications every year.[1] Thousands of other projects are regulated by general permits issued in accordance with Section 404(e). 33 U.S.C. § 1344(e); 33 C.F.R. Part 330.

Although EPA has authority to issue permits under other sections of the Act, Congress made the Corps the permitting authority under Section 404, in recognition of the Corps' special expertise in this area. 33 U.S.C. § 1344(a); App. E 111a. Section 404(b) provides that the Corps must base its permit decision on guidelines (the

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[1] United States General Accounting Office, *WETLANDS, The Corps Of Engineers' Administration Of The Section 404 Program, Report to the Chairman, Subcomm. on Investigations and Oversight, Comm. on Public Works and Transportation, House of Representatives* 11 (Washington, D.C.: GAO/RCED-88-110, July, 1988) (In 1986, the Corps issued approximately 10,500 permits and denied an estimated 500 applications; 3,000 applications for permits were cancelled or withdrawn).

"404(b)(1) guidelines") developed by EPA in conjunction with the Corps. 33 U.S.C. § 1344(b); App. E 111a. These guidelines require the Corps to consider a comprehensive range of environmental, scientific, and economic factors in making its permitting decisions. 40 C.F.R. Part 230. In addition, the Corps applies a wide-ranging "public interest review" under regulations that were already in effect at the time the Clean Water Act was passed.[2]

Of particular importance here, the Corps may not issue a permit if there is a "practicable alternative" available to the applicant that "would have less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a); App. F 113a-114a. An alternative is "practicable" if it is available to, or can reasonably be obtained by, the applicant and will fulfill the applicant's project purpose. 40 C.F.R. § 230.10(a)(2); App. F 113a. With respect to "non-water-dependent activities" proposed for wetlands (*i.e.*, activities that could be accomplished on non-wetland sites, such as construction of a shopping mall), practicable alternatives are "presumed to be available" unless the applicant clearly demonstrates otherwise. 40 C.F.R. § 230.10(a)(3); App. F 113a-114a.

Finally, Section 404(c) of the Act authorizes EPA to overrule a Corps decision to grant a permit and so to prohibit the use of a specific area as a discharge site for dredged or fill material whenever EPA "determines . . . that the [proposed] discharge . . . will have an unacceptable adverse effect" on one of five specifically enumerated environmental interests. 33 U.S.C. § 1344(c); App. E 111a-

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[2] In this review, the Corps balances the "national concern for both protection and utilization of important resources," considering a wide range of factors such as "conservation, economics, aesthetics, general environmental concerns, wetlands . . . and, in general, the needs and welfare of the people." 33 C.F.R. § 320.4.

112a. In exercising this authority, EPA has the burden of proving that an "unacceptable adverse effect" will occur.[3]

In this case, Pyramid sought to fill a wetland and in an approximately 18-month period obtained all the necessary permits from the local government and the State of Massachusetts, including approval under the Massachusetts Wetlands Protection Act, and from the Corps pursuant to Section 404(a) and (b). In approving the project, the Corps specifically found that no practicable alternatives were available to Pyramid. EPA, however, overrode the Corps' decision, vetoing the permit on the ground that a site optioned by a competing shopping center developer three months before Pyramid began searching for sites in the Attleboro, Massachusetts area "is available" to Pyramid within the meaning of the guidelines.

C. Pyramid's Project And The Site

Pyramid is a large shopping center developer in the Northeast. It began searching actively for suitable sites in the Attleboro, Massachusetts area in September 1983. JA 225, JA 291.[4] Pyramid purchased an 82-acre site ("South Attleboro") from the Edward J. DeBartolo Corporation ("DeBartolo"), another shopping center developer, in December 1983, and proposed to build a two-level shopping mall. App. C 95a. The site contains 49.6 acres of red maple swamp.

Pyramid has a competitor in the vicinity, New England Development Company ("NED"). On July 1, 1983, before Pyramid began looking for sites in the area, NED had

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[3] 45 Fed. Reg. 85,336, 85,338 (December 24, 1980); 44 Fed. Reg. 58,076, 58,080 (October 9, 1979).

[4] References to the Joint Appendix filed in the court below are as follows: "JA ___." References to documents in the Administrative Record which are not included in the Joint Appendix are as follows: "AR, ___." References to the Appendix filed with this Petition are as follows: "App. A ___," and so forth.

acquired a two-year option on another shopping center site ("North Attleboro"). *Id.*

D. Proceedings To Date

1. State and Local Permit Proceedings and Approval of Massachusetts Supreme Judicial Court

After acquiring its site in December 1983, Pyramid applied for and obtained all necessary state and local approvals.[5] Among other things, Pyramid obtained a state wetlands permit for the project pursuant to the Massachusetts Wetlands Protection Act, and the Massachusetts Supreme Judicial Court upheld the permit. *Citizens for Responsible Environmental Management v. Attleboro Mall, Inc.*, 400 Mass. 658, 511 N.E.2d 562 (1987).

2. Corps Regulatory Proceedings

Pyramid applied to the New England regional office of the Corps ("NE Corps") for an individual permit in July 1984. The application stated that North Attleboro was "unavailable." AR, B-2 11. Because the NE Corps was unable to resolve certain policy issues not relevant to this Petition, the Corps' Director of Civil Works ordered the case to be elevated to Corps headquarters.

The Director of Civil Works determined that the project satisfied the 404(b)(1) guidelines and the Corps' public interest review regulations, and directed the local office to issue a permit. On the key issue of availability of alternatives, the Director agreed with the NE Corps and found

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[5] The land was rezoned for development as a shopping center, and the Massachusetts Department of Public Works approved all necessary roadway modifications. State water quality certification was issued in March 1985, pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341. In accordance with the Massachusetts Environmental Policy Act, an Environmental Impact Report was prepared and approved by the Commonwealth's Office of Environmental Affairs. AR, B-4. The Mayor, City Council, City Planner, and the City's economic development agency all support the project. JA 89.

that North Attleboro was not available "because it has been optioned by another mall developer." JA 83. On June 28, 1985, the NE Corps formally notified the regional offices of EPA and the United States Fish and Wildlife Service that it intended to issue a permit to Pyramid. AR, B-16.

3. EPA Regulatory Proceedings

In July 1985, EPA's Regional Administrator notified the Corps and Pyramid that he intended to initiate veto proceedings under Section 404(c). AR, B-18. On March 4, 1986, the Regional Administrator recommended to EPA headquarters that Pyramid's project be prohibited, urging a legal rationale that headquarters would later reject. JA 119-196. EPA's Assistant Administrator for External Affairs ("Assistant Administrator") issued a Final Determination on May 13, 1986, prohibiting the project because it would have avoidable, and, therefore, "unacceptable," adverse effects on wildlife. App. C 108a.

In reaching this conclusion, the Assistant Administrator first found that of the environmental interests protected by Section 404(c), only wildlife would be adversely affected. *Id.* at 82a. She then examined whether the adverse effect was unacceptable "by reviewing whether there are practicable, less environmentally damaging alternatives" to the South Attleboro site. *Id.* at 83a.

Turning to "practicable alternatives," the Assistant Administrator rejected the longstanding Corps understanding that the availability of alternatives is considered at the time of permit review. Instead, she changed the rules of the game and determined that availability should be tested as of the time the applicant "entered the market." *Id.* at 95a. She did not, however, define what constitutes "market entry." This theory had never been advanced or suggested, either by the Corps or EPA, before this proceeding.

Pyramid had begun its investigation of the trade area in September 1983, approximately eight weeks after its

competitor NED had optioned the North Attleboro site. The Assistant Administrator, however, applying the retroactive market entry theory, relied on alleged "trade custom" to find that Pyramid must have "entered the market" before the date on which NED had optioned North Attleboro. *Id.* at 95a n.15. Then, ignoring the fact that EPA's own regulations place the burden in a 404(c) proceeding on the Agency, the Assistant Administrator concluded that "[o]n this record, I cannot find that Pyramid has met its burden of showing that the North Attleborough [sic] site was unavailable." *Id.* at 95a-96a. Since, according to this novel analysis, the North Attleboro site was "available" to Pyramid when it entered the market, the Assistant Administrator concluded that any adverse effects resulting from Pyramid's project were "avoidable" and therefore "unacceptable." *Id.* at 108a. She therefore vetoed the permit.

4. District Court Opinion

The district court upheld EPA's Final Determination. Although the court rejected the Agency's "trade custom" inference, it deferred to EPA's interpretation of the regulation, holding that its "carefully circumscribed" function was to "uphold a reasonable [EPA] interpretation, even if the court would not have reached the same conclusion in the first instance." 674 F. Supp. at 412; App. B 45a.

5. Second Circuit Opinion

The Second Circuit affirmed, with one judge dissenting. 850 F.2d at 43; App. A 5a. While it was uncertain whether EPA's interpretation merited deference, the court ruled that the "market entry" theory was the only reasonable interpretation of the regulations. 850 F.2d at 44; App. A 17a. Rejecting Pyramid's argument that "market entry" was little more than a standardless evasion, the court observed that there was no need to "pin down the standard," for to do so would only "confuse things further." 850 F.2d at 45; App. A 22a.

Judge Pratt dissented on the ground that the market entry theory improperly focuses on the decision-making techniques and tactics of a developer at the time it entered the market, rather than the actual alternatives to development in wetlands, which is Section 404's central purpose. 850 F.2d at 48; App. A 25a. The proper time to analyze the availability of alternatives, Judge Pratt found, is as of the time EPA makes its 404(c) decision, a position that is "reinforced by the present-tense language of the regulation, which commands EPA to determine whether an alternate site 'is available.' " 850 F.2d at 49; App. A 29a.

REASONS FOR GRANTING THE WRIT

This case raises important issues of statutory and regulatory construction in the administration of the Clean Water Act.[6] The Corps evaluates approximately 14,000 individual applications for Section 404 permits per year. The cornerstone of the Corps' Section 404 analysis is its threshold determination whether there is a practicable alternative site for the proposed project. Until the decision in this case, the Corps and EPA had always evaluated the availability of alternatives as of the time of permit review.

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[6] This Court has granted certiorari in other cases to review similar issues. *See, e.g., Commonwealth of Pennsylvania v. Union Gas Company*, 832 F.2d 1343 (3d Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S. Ct. 1219 (1988) (Certiorari granted to determine whether private parties may sue states in federal court to recover cleanup costs under the Superfund law); *Tull v. United States*, ___U.S. ___, 107 S.Ct. 1831, 1835 (1987) (Certiorari granted to determine whether a jury trial is required to determine liability and assess penalties for violation of Section 404 of the Clean Water Act); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (Certiorari granted to review validity of Corps' regulations defining "adjacent wetlands" as "waters of the United States" under the Clean Water Act); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) (Certiorari granted to review validity of EPA's "bubble" concept under the Clean Air Act).

In this case, the Second Circuit ignored this settled administrative practice and endorsed EPA's novel "market entry" theory of practicable alternatives, which the Agency had announced for the first time in this proceeding. But EPA's "market entry" theory provides no standard against which the regulated community can measure its conduct, no guidance for future regulatory decisions, and no standard against which a reviewing court can assess administrative decisions. Indeed, EPA appears to take the position that it can review the availability of alternatives as of any time it sees fit in each particular case. The Second Circuit has compounded the harm caused by EPA's erroneous ruling by holding that the "market entry" theory is the only correct interpretation of the regulation. What may have been only an unfair, *ad hoc* ruling against Pyramid by EPA has thus been converted into precedent binding on EPA and, apparently, the Corps in the Second Circuit. But the Corps disagrees with the "market entry" theory. Unless the decision is reversed, the result will be to throw the administration of the Section 404 program into a state of unparalleled confusion and uncertainty.

Moreover, the market entry standard imposes an oppressive and unworkable burden on private and public permit applicants. Since the applicant has the burden of demonstrating the absence of alternatives during the permitting stage (as opposed to the 404(c) veto stage) and since the court below declined to define what acts constitute market entry, no applicant will ever be able to satisfy the market entry "standard."

Indeed, private investors are constantly searching for attractive investment opportunities; they are never not in the market. The impact on public capital facilities planning can also be devastating. Consider, for example, a state highway authority that assembles parcels of land over a period of years to build a new road. Does the state highway authority enter the market when it first identifies the

need for a new road, or when it first selects a route, or when it purchases the first parcel?

Finally, the market entry theory is contrary to the plain language of the regulations and inconsistent with the intent of the Clean Water Act to protect the Nation's water resources, including wetlands. To accomplish this purpose, Congress mandated an inquiry into the wetland resource. Until the decision in this case, the Corps and EPA had always properly interpreted the statute as requiring a practicable alternatives analysis which focused on the wetland resource: before the Corps could issue a permit, it had to determine that there was no other available site whose development would cause less environmental damage. The "market entry" theory shifts the focus away from the land, making the protection afforded the wetland dependent on the owner's business practices and the date the owner is deemed to have entered the market. This inquiry loses sight of the real purpose of the Clean Water Act.

In addition, the market entry theory subtly undercuts Congress' purpose in creating the Section 404 permitting program within the Clean Water Act. That permitting program reflects Congress' recognition that environmental protection must accommodate reasonable economic development. In order to balance these conflicting goals, Congress built the practicable alternatives analysis into the Section 404 permitting decision. The Second Circuit decision will destroy that balance by giving EPA discretion to shift the timing of the alternatives analysis with each new case, and will encourage *ad hoc* decision making. EPA will always have grounds to veto a permit if it so chooses.

Unless reversed by this Court, the Second Circuit's opinion will allow federal officials absolute discretion to deny permits based on case-by-case determinations of the point of "market entry," regardless of other priorities contemplated by Congress or by local and state planning and environmental authorities. Congress did not contemplate

giving EPA this kind of authority when it enacted Section 404.

I. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE MARKET ENTRY THEORY PROVIDES NO STANDARDS AGAINST WHICH THE REGULATED COMMUNITY CAN MEASURE ITS CONDUCT

A. The Point Of Market Entry Remains Wholly Undefined

The "market entry" theory endorsed by the Second Circuit is virtually meaningless, providing no guidance to the regulated community of the standard to which it will be held.

The Second Circuit acknowledges that the Section 404(b)(1) regulations are written in the present tense, on their face mandating an inquiry into whether an alternative "is available" to the applicant at the time the permit is reviewed. 850 F.2d at 43; App. A 16a. Yet the court ignores the regulatory language and Congressional intent and asserts that EPA's retrospective inquiry into possible alternatives at the time of "market entry" is the only possible interpretation of the regulatory term "is available." 850 F.2d at 44; App. A 17a. Moreover, the court compounds its error by ruling that it "is unnecessary to pin down the [market entry] standard . . . and that it would confuse things further to attempt to do so." 850 F.2d at 46; App. A 22a. But confusion is precisely what this opinion has sown.

EPA has consistently refused to define "market entry." In the Final Determination, EPA's Assistant Administrator referred to "market entry" alternatively as the "period when the developer is selecting a site for its project," App. C 93a, "follow[ing] the market area," *id.* at 95a n.15, "exploring the . . . trade area," *id.* at 95a, or "search[ing] for alternative sites." *Id.* at 94a.[7] In its district court briefs,

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[7] The Agency seemed to recognize that it was on difficult ground,

the government "defined" market entry as "the time of project planning," Defendants' District Court Brief at 24, "the time Pyramid began investigating the market," *id.* at 59, "search[ed] for a site," *id.*, "select[ed] the site," *id.* at 60, or "made its business decisions," *id.* at 66.

On appeal, EPA once again refused to specify the point in time at which the availability inquiry begins. Instead, it claimed the need to "reserve judgment" on this decisive question, Brief of Appellees at 32 n.20, stating opaquely that the market entry theory ". . . tak[es] account of the temporal continuum in which a wetland site-selection plan evolves." *Id.* at 28. As to which of numerous possible events would "trigger the application of the 'is available' test," EPA commented blithely:

> The plain answer is that while no one of these points may be definitive, *each* may be germaine [sic], individually and collectively.

Id. at 34 n.21 (emphasis in original).

EPA's equivocation is intolerable in light of the central role the alternatives analysis plays in the regulatory framework. An applicant simply cannot rebut the presumption that an alternative is available if EPA is allowed to shift the target date with each case.

The Second Circuit's opinion suffers from the same flaw. Though the court held that the "market entry" theory is the only correct interpretation of the regulations, it too declined to define the term either in the abstract or as

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for, after announcing the new theory, the Assistant Administrator stated, "I need not, and do not, decide here what the relevant time period would be in other circumstances. . . ." App. C 93a n.14. Were this true, the issue might not warrant this Court's review. However, given the Second Circuit's declaration that "market entry" is the only possible standard, and the Corps' contrary practice, review is critical to clarify this murky area of regulatory practice.

applied to this litigant in this case.[8] The point of market entry is left wholly undefined, with the result that the Second Circuit's opinion fails to provide guidance for future conduct by permit applicants and future decisions by the Corps and EPA.

The potential for chaos in the administration of the Section 404 program is compounded because the Corps does not agree with EPA's "market entry" concept. Thus, applicants for permits will not know what presumption it is they will be required to rebut. And if it is the "market entry" presumption, they will not know how to rebut it because the term is undefined and undefinable.

B. The Market Entry Theory Is Unworkable As A Practical Matter

Moreover, as a practical matter, governmental public facilities agencies planning to build schools, hospitals, and airports; land use planners attempting to establish a compatible mix of land uses within their jurisdictions; and private sector parties such as land developers, home builders and industrial companies are constantly evaluating the market for land use and development opportunities. They are always in the market, and therefore, in the context of their operations, "market entry" is a meaningless concept. As Judge Pratt, in dissent, observed: "Without an-

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[8] The uncertainty resulting from the Second Circuit's ruling stems in part from its refusal to undertake the kind of judicial review required in challenges to administrative action. As the District of Columbia Circuit has observed:

> Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible.

Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971); *see also Atchison, Topeka & Santa Fe Railway v. Board of Trade*, 412 U.S. 800, 806-07 (1973).

swers to these questions [about the meaning of market entry] a developer can never know whether to proceed through the expense of contracts, zoning proceedings, and EPA applications." 850 F.2d at 49; App. A 27a.

The uncertainty is compounded by the difficulty in identifying wetlands and the possibility that a landowner may be unaware that his property is a wetland. EPA's own regulations note that one needs a "specialist" to determine wetland boundaries, 40 C.F.R. 230.41(a)(2). The recent report of the National Wetlands Policy Forum (convened by the Conservation Foundation at the request of EPA) confirms the problem:

> Determining whether a particular piece of property is a wetland can sometimes be difficult. To an untrained person, for instance, some forested wetlands may appear very similar to nearby upland forests. An expert in vegetation, soil, and water conditions may be needed to tell the difference. For this reason, a landowner may not even realize that a piece of land qualifies as a wetland and is therefore subject to regulation.[9]

Notwithstanding these difficulties, the "market entry" theory requires an applicant to survey the market long before it may be aware that its site is even a wetland covered by the Act. If it proceeds with construction unaware that the site is a wetland, it will be impossible for an applicant, for example, a commercial home builder, to show that it had considered alternatives when it entered the market years earlier. *See* Amici Petition for Certiorari of National Association of Home Builders *et al.*

Other practical difficulties with the "market entry" theory depend on the nature of the permit applicant, its proj-

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[9] The Conservation Foundation, *Protecting America's Wetlands: An Action Agenda, The Final Report of the National Wetlands Policy Forum* 36 (1988).

ect and its site. Many such problems are elaborated by *amici* urging this Court to review the Second Circuit decision. For present purposes, a few examples will suffice.

Local, state and regional planning efforts will be undermined. Under the market entry theory, EPA could, for example, claim the authority to deny a municipality's application for a permit to construct a resource recovery facility on the ground that the town council did not consider all alternative sites at its first public hearing concerning the facility years earlier. *See* Amicus Petition for Certiorari of American Planning Association.

The theory will be equally damaging to the nation's port authorities, many of which have owned substantial parcels of wetlands adjacent to waterways for decades. If, for example, a port authority applies for a permit to expand commercial activity in a wetland, then, presumably, under the Second Circuit holding, the Corps would be required to consider alternatives available when the port "entered the market." It remains an open question whether market entry occurred when the state passed legislation creating the port authority forty years earlier, or when the port purchased the property in question some twenty years earlier, or when the port's consultants first identified the need for additional commercial development five years ago. The uncertainty surrounding the timing of the alternatives analysis will undoubtedly delay or impair the port's ability to upgrade deteriorating facilities as financial markets may either refuse to finance such projects or exact high premiums to compensate for the increased risks. Other public facilities agencies will face similar problems, and the requirement that they actually make inquiries about availability, thus virtually advertising their intentions to buy property for roads, schools and the like, will undoubtedly add to the cost of acquiring needed land.[10]

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[10] Had EPA submitted its "market entry" theory to formal rulemak-

Only this Court can rectify the chaotic situation created by the Second Circuit opinion by requiring the agencies to articulate a standard with sufficient clarity to apprise the regulated community of the standard to which it will be held.[11]

II. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE MARKET ENTRY THEORY IS CONTRARY TO THE STATUTORY AND REGULATORY SCHEME

A. The Market Entry Theory Is Inconsistent With The Purpose of Section 404

The Second Circuit has held that the market entry theory is the only correct interpretation of the regulations. The court's only justification for the decision is its assertion that the market entry theory is consistent with the objectives of the Clean Water Act, and that the Corps' and EPA's prior understanding of the regulation would "thwart" these objectives.[12] 850 F.2d 43-44; App. A 16a-

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ing procedures, as its regulations require, it would have become aware of these practical difficulties. The "market entry" theory is a modification to the "basic application" of the Section 404(b)(1) guidelines. Under the guidelines themselves, such modifications may only be accomplished by notice and comment rulemaking and in conjunction with the Corps. 40 C.F.R. § 230.2(c). In addition, the Administrative Procedure Act, 5 U.S.C. § 552, requires that agency "policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). The "market entry" theory is such a policy.

[11] *See South Terminal Corp. v. EPA*, 504 F.2d 646, 670 (1st Cir. 1974) (EPA regulation requiring denial of permit for construction of parking spaces unless they "will not interfere" with attaining air quality standards was held impermissibly vague: "The prospective applicant for a permit is utterly without guidance as to what he must prove, and how. And the standard is so vague that it invites arbitrary and unequal application").

[12] The only evidence the court offers in support of its claim that EPA's retrospective analysis is consistent with Congressional intent is

17a. The court is wrong.

Congress passed the Clean Water Act in 1972 to protect the Nation's water resources, including wetlands. 33 U.S.C. § 1251. Recognizing the need to accommodate reasonable economic development and other values in the public interest, Congress did not ban the "discharge" of all "pollutants" but set up permitting programs to regulate such discharges. Section 404 established the permitting program that regulates the discharge of dredged and fill materials. 33 U.S.C. § 1344(a); App. E 111a. To effectuate the balancing between environmental and other goals, Congress required the regulations governing Section 404 permitting decisions to include consideration of whether the permit applicant could accomplish its purpose at an alternative site that would have less adverse environmental impacts.[13]

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one line from the preamble to EPA's regulations. According to the court:

> [T]he preamble to the 404(b)(1) guidelines states that the purpose of the 'practicable alternatives' analysis is 'to recognize the special value of wetlands and to avoid their unnecessary destruction, particularly where practicable alternatives *were* available in non-aquatic areas to achieve the basic purpose of the proposal.' 45 Fed. Reg. 85,338 (1980) (emphasis added by the court).

850 F.2d at 43-44; App. A 16a. The Agency's preamble is, of course, not evidence of Congressional intent. In addition the phrase the court quotes is out of context. Notwithstanding the court's emphasis on the past tense "were available," the sentence was written in the past tense because EPA was explaining the meaning of a regulatory test it had once proposed to adopt but since had decided to reject. Quoted in its entirety, the sentence reads: "The original purpose, which many commenters commended, was to recognize the special values of wetlands and to avoid their unnecessary destruction, particularly when practicable alternatives were available in non-aquatic areas to achieve the basic purposes of the proposal." 45 Fed. Reg. 85,338-339.

[13] 33 U.S.C. § 1344(b) (requiring that the governing regulations be based on the ocean discharge criteria contained in Section 403(c), 33

Thus, Congress commanded an objective inquiry into the impacts on the physical environment that would result from the choice of one site over another.

As Judge Pratt pointed out in dissent, the "market entry" theory strays from the statute's central purpose. It disregards the environmental impacts on the land in question and on alternative sites and instead makes the protection afforded the wetland dependent on when the owner "entered the market." Such an inquiry, however, does not protect the wetland:

> The market entry theory in effect taints a particular developer with respect to a particular site, while ignoring the crucial question of whether the site itself should be preserved. Under the market entry theory, developer A would be denied a permit on a specific site because when he entered the market alternatives were available, but latecomer developer B, who entered the market after those alternatives had become unavailable, would be entitled to a permit for developing the same site. In such a case, the theory no longer protects the land, but instead becomes a distorted punitive device: it punishes developer A by denying him a permit, but grants developer B a permit for the same property—and the only difference between them is when they 'entered the market.'

850 F.2d at 48; App. A 26a-27a (Judge Pratt dissenting).

Not only does the market entry theory fail to protect the wetland but it leads inevitably to consideration of factors far different from those contemplated by Congress when it mandated consideration of the relative environmental impacts resulting from the use of alternative sites.

U.S.C. § 1343(c)); 33 U.S.C. § 1343(c)(1)(F) (requiring consideration of "land based alternatives").

In this case, for example, EPA demanded copies of private business memoranda, correspondence and other records concerning Pyramid's relationship with the previous owner of the South Attleboro site, Pyramid's business plans in other trade areas outside of the Attleboro trade area, cost estimates for various features of Pyramid's proposed project, and details of Pyramid's dealings with real estate agents and potential tenants for its shopping mall.[14] JA 267-271. This is not the inquiry into the impacts on the physical environment that Congress contemplated when it established the alternatives analysis.[15]

The court suggests that the "market entry" theory vindicates the Act's goals because it creates an incentive for

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[14] The result of this and other similar tangents pursued by EPA is that EPA simply lost sight of the purpose of the alternatives analysis, which is to determine whether, in fact, an alternative "is available." Instead, it recast the inquiry to determine whether the applicant had been "truly fastidious" in investigating alternatives. Brief of Appellee at 32 n.20. The bankruptcy of EPA's position is summed up by a hypothetical it posed:

> A hypothetical case in which the applicant convincingly demonstrates that when it undertook its market survey an alternative was not obtainable, and only much later became so, might at least in some circumstances possibly call for a different Section 404(c) outcome.

Id. As this hypothetical so candidly suggests, EPA's "market entry" theory simply does not protect the wetland resource. It merely punishes or rewards developers based on EPA's perception of their bona fides.

[15] *See Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561, 566-68 (D. Mass. 1987), *appeal denied*, 841 F.2d 440 (lst Cir. 1988), *cert. denied sub nom. New Haven v. Marsh*, ___U.S. ___, 109 S.Ct. 128 (1988). (Where Corps' denial of permit is based on economic factors, such factors must be "proximately related to changes in the physical environment . . . Corps may not . . . consider effects unrelated to the impact which a proposed project will have on the environment.") Because the date of market entry is totally unrelated to the impacts a given project will have on the environment, it is an improper basis for a permit decision under Section 404.

developers to search for alternative sites at the time they first consider development.[16] Such an incentive, however, exists regardless of the timing of the alternatives analysis. No developer would choose a wetland site and risk its costly investment on a hunch that by the time of permit review *all* uplands sites would no longer be available. Indeed, the applicant's knowledge that it will be required during permitting to establish the absence of uplands alternatives is by itself a substantial incentive to avoid a wetlands site.

Not only does the market entry theory lead the Agency far afield of the inquiry Congress contemplated but it subtly undermines the integrity of the balance Congress sought to establish through the alternatives analysis. As Judge Pratt pointed out in dissent:

> Congress designed [Section 404] to preserve the environment consistent with reasonable accommodation to the economic and social needs of the public; it was not concerned with the identities or past activities of particular developers.

850 F.2d at 48; App. A 26a.

Accordingly, Congress established a permit program under Section 404(a) which is intended to authorize discharges as long as there is compliance with certain requirements.[17] Congress contemplated that in making a permitting decision the Corps would balance environmental

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[16] Conversely, the court argues that if alternatives were not available when the developer purchased its site, but became available by the time of permit application, the application would be denied. 850 F.2d at 44; App. A 17a. Pyramid has always agreed with this statement. If a feasible alternative is available at the time of permit review, the application should be denied.

[17] *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 46 (D.C. Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 68 (1988) (Section 404(a) establishes an exemption from "Section 301(a)'s broad ban on discharge of pollutants into navigable waters").

protection and economic concerns, and that the Corps could determine under Section 404(b) that economic concerns or other competing values outweighed environmental protection in a particular case.[18] EPA, on the other hand, was empowered under Section 404(c) to veto the Corps' decision to grant a permit in the event EPA determined that the proposed project "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."[19]

Thus, Congress gave discrete roles to the Corps and EPA. It authorized the Corps to make the permitting decision based on numerous environmental and economic factors in its public interest review and on the balancing process inherent in the 404(b)(1) guidelines' practicable alternatives analysis. Congress gave EPA the power to veto a project based on environmental considerations. In this case, EPA did not rely on its environmental expertise. Rather, it rejected the Corps' analysis of available alternatives and economic impacts, and offered its market entry theory instead.[20] In doing so, the Agency upset the political

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[18] "[W]here it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 135 n.9 (1985); *Monongahela Power Co. v. Marsh*, 809 F.2d at 46 (In enacting Section 404, "Congress insisted upon stringent federal discipline in an effort to curb ecological pollution and degradation without interfering unjustifiably with farming, forestry, and other legitimate activities reserved for regulation primarily by local governments").

[19] 33 U.S.C. § 1344(c), App. E 111a-112a; S. Conf. Rep. 1236, 92d Cong., 2d Sess., at 141 *reprinted in* 1972 U.S. Code Cong. & Admin. News 3776, 3818-19.

[20] In addition, as discussed more fully in the Petition for Certiorari filed by the Citizens In Support of Attleboro Mall, EPA's consideration of cumulative impacts in the context of a Section 404(c) action was

compromise struck by Congress.[21] The Second Circuit opinion, by endorsing the market entry theory and giving EPA unlimited authority to shift the time of market entry on an *ad hoc* basis, effectively vitiates the Congressional compromise.[22]

Moreover, as Judge Pratt pointed out, the market entry theory may also be easily circumvented:

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wholly improper. Section 404(c) authorizes the Administrator to prohibit or restrict the use of a "defined area" when the Administrator "determines . . . that the discharge of . . . materials into such area will have an unacceptable adverse effect." 33 U.S.C. § 1344(c); App. E 111a-112a. Clearly, the statute contemplates a site-specific inquiry. Thus, the issue in a 404(c) case should be whether the environmental impacts on the "defined area" are so great as to cause an unacceptable adverse effect. EPA, however, ignored the Congressional intent and improperly based its decision on the "cumulative loss" in Massachusetts. App. C 107a.

[21] After considering several different administrative arrangements for handling the discharge of dredged and fill materials, each of which proposed a different allocation of permitting authority between the Corps and EPA, Congress ultimately decided to give the permitting authority to the Corps. In so doing, it expressly carved the Section 404 program out of EPA's permitting authority under other sections of the Act. It made this choice in recognition of the Corps' special expertise on dredge and fill matters and long experience in managing related permitting programs under Sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 and 402, and to avoid "creat[ing] a burdensome bureaucracy." S. 2770, 92d Cong., 1st Sess. (1971), *reprinted in* Senate Committee on Public Works, A Legislative History of the Water Pollution Control Act Amendments of 1972 ("1972 Leg. Hist.") at 1685-92; Senate Debate on S. 2770, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 Leg. Hist. at 1386, 1392; H.R. 11896, 92d Cong., 2d Sess. (1971), *reprinted in* 1972 Leg. Hist. at 1063-64; Senate Consideration of the Conference Report (Oct. 4, 1972), *reprinted in* 1972 Leg. Hist. at 177.

[22] *See Bethlehem Steel Corp. v. EPA*, 723 F.2d 1303, 1309 (7th Cir. 1983) ("[W]here a statute strikes a political balance but administration of the statute is entrusted to an agency that may not embody that balance, it is dangerous to defer automatically to the agency's view. . . The court must enforce the compromise, not the maximum position of one of the interest groups among which the compromise was struck").

> In this case, for example, if a Donald Trump had "entered the market" after NED took the option on the North Attleboro site and made it unavailable, under EPA's approach he apparently would have been entitled to a permit to develop Sweedens Swamp. But after obtaining the permit and the land, could Trump then sell the package to Pyramid to develop? Or could he build the mall and then sell the developed site to Pyramid? If, on the one hand, the answer to these questions is "yes", then the market entry theory is no more than a troublesome mirage that could easily be circumvented by Pyramid's using a second party to buy the land and obtain the permit. If, on the other hand, the answer is "no", then Pyramid is forever tainted, forever prohibited—somewhat like a bill of attainder—from owning this particular site, and only because at some time in the past it had "entered the market" while an alternative was still available.

850 F.2d at 48-49; App. A 27a.

In sum, the market entry theory is inconsistent with the purpose of Section 404 itself. The result is a standard that is unworkable in the real world and that will not protect wetlands.

B. The Market Entry Theory Is Contrary To The Language Of The Section 404(b)(1) Guidelines

The market entry theory is also inconsistent with the language of the Section 404(b)(1) guidelines. As noted earlier, the guidelines require the Corps to determine whether "there *is* a practicable alternative to the proposed discharge." 40 C.F.R. § 230.10(a) (emphasis added); App. F 113a. The term "practicable alternative" is also defined in the present tense:

> An alternative is practicable if it *is* available. . . . If it is otherwise a practicable alternative, an area not *presently* owned by the applicant which *could* reasonably *be* obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity *may be* considered.

40 C.F.R. § 230.10(a)(2) (emphasis added); App. F 113a. An alternative "is available," then, only if it is available to, or could reasonably be obtained by, the applicant at the time the Corps makes its decision on the permit application. By finding that it should consider availability retroactively to the time the applicant "entered the market," EPA distorted the language of the regulation.

Stated simply, EPA says "is" means "was."

This Court recently rejected a similar effort to convert present-tense language to the past tense, enjoining courts and presumably agencies to give statutes their "most natural reading." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, ___U.S. ___, 108 S.Ct. 376, 381 (1987).[23]

Furthermore, although no cases have directly addressed the timing of the practicable alternatives test, in every reported case the Corps has analyzed availability of alternative sites at the time of permit review, and the courts have affirmed decisions based on that analysis.[24] Indeed,

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[23] The Second Circuit's reading of the guidelines is both unnatural and strained: "[T]he 'present' of the regulations might be the time the application is submitted; the time it is reviewed; or any number of other times." 850 F.2d at 43; App. A 16a. The two specific times mentioned by the Court are consistent with Petitioner's position. As to what "any number of other times" might be, that is precisely what we have been asking for over two years.

[24] *See National Audubon Society v. Hartz Mountain Development Corp.*, 14 Envtl. L. Rep. 20724, 20731 (Envtl. L. Inst.) (D.N.J. Oct. 24, 1983) (Corps, with court approval, examined over a dozen alternatives available to applicant at time of permit review. Neither the Corps nor the court speculated as to what alternatives might have been available to

not only has the Corps applied a present-tense analysis, but EPA itself has consistently done so in prior 404(c) proceedings.[25]

C. The Second Circuit Decision Distorts The Regulatory Scheme By Allowing EPA To Ignore Its Burden Of Proof Under Section 404(c)

The Second Circuit opinion, by allowing EPA to ignore its burden of proof under Section 404(c), distorts the regulatory scheme. When EPA invokes its 404(c) authority, overriding a contrary Corps decision, the regulations place on the Agency the burden of proving that an applicant's project will have an "unacceptable adverse effect" on the proposed site.[26]

EPA simply ignored its burden, claiming that a veto was warranted because it was not satisfied that Pyramid had demonstrated, at the permitting stage under Section

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able to applicant at time of permit review. Neither the Corps nor the court speculated as to what alternatives might have been available to the applicant at some indeterminate point when the company "entered the market"); *Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986) (Court affirmed Corps' evaluation of alternatives available at time of permit review despite the fact that filling had already occurred and applicant was applying for an after-the-fact permit); *cf. Hough v. Marsh*, 557 F. Supp. 74, 83-84 (D. Mass. 1982) (Court invalidates 404 permit where it was doubtful that information used in alternatives analysis accurately depicted market conditions at time of permit decision).

[25] Excluding the decision under review here, EPA had issued only four 404(c) Final Determinations prior to its veto in this case. In two of these cases, the question of practicable alternatives was not an issue. In the two others, EPA examined only alternatives that were available to the applicant at the time of the 404(c) proceeding. "Final Determination of the Assistant Administrator for External Affairs Concerning the Jack Maybank Site on Jehossee Island, South Carolina Pursuant to Section 404(c) of the Clean Water Act," April 5, 1985 ("*Maybank Determination*"); "Final Determination of the Administrator Concerning M.A. Norden Site Pursuant to Section 404(c) of the Clean Water Act," June 15, 1984 ("*Norden Determination*").

[26] *See* 45 Fed. Reg. 85,336, 85,338 (December 24, 1980).

404(a), the absence of available alternatives. But EPA cannot meet its burden during the veto proceeding by claiming that an applicant did not meet its burden during the permitting phase.[27] This is especially true where, as here, the permitting authority found that the applicant had met its permitting burden. JA 82. As EPA explained in the preamble to its 404(c) regulations:

> [T]he Administrator's authority . . . under Section 404(c) operates independently of [the Corps'] permitting authority in 404(a). . . . If the Administrator uses his 404(c) 'veto,' then he does have the burden to justify his action, but that burden does not come into play until he begins a 404(c) proceeding.

45 Fed. Reg. at 85,338. The Agency's administrative sleight-of-hand does not meet its burden of proof, and the Second Circuit, by failing to hold the Agency to its burden, undermines the regulatory scheme.[28]

CONCLUSION

Because the Second Circuit's endorsement of the market entry theory is inconsistent with the language of the Section 404(b)(1) guidelines and the purpose of Section 404 of the Act, because that theory provides no guidance to the regulated community, and because the lower court opinion creates enormous confusion for any private or public entity subject to Section 404 jurisdiction, the Petition for Certiorari should be granted.

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[27] Where an agency has the burden of proof, it must satisfy that burden by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 102 (1981); *see Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 652-53 (1980) (agency cannot avoid its statutory burden by relying on policy that imposed burden on industry); *United Scenic Artists Local 829 v NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985) (agency cannot create a presumption on grounds of policy to avoid necessity for making findings required by statute).

[28] The Second Circuit properly declined to defer to EPA's interpre-

Respectfully submitted,

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tation in this case. 850 F.2d at 45; App. A 20a. The Corps and EPA disagree on the interpretation of the Section 404(b)(1) guidelines; therefore, the Court must use its own judgment in construing the regulations. *General Electric Co. v. Gilbert*, 429 U.S. 125, 144-145 (1976). Moreover, because the Corps is the permitting authority, and addresses the zoning, economic and financial issues implicated in the practicable alternatives analysis in 14,000 permit applications each year, deference to the Corps, not EPA, is warranted. *See National Association of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810, 821 (1983) (where statute divided ratemaking responsibility between two agencies, Court deferred to agency in which ratemaking authority was "vested primarily").

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APPENDIX A

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT.

Nos. 852, 902, Dockets 87-6275, 87-6295.

John A. BERSANI, Newport Galleria Group, Robert J. Congel and the Pyramid Companies,
Appellants.

v.

Joseph ROBICHAUD and Citizens in Support of Attleboro Mall,
Intervenor-Plaintiffs-Appellants,

Home Building Association of Massachusetts,
Intervenor-Plaintiff.

United States Environmental Protection Agency, United States Army Corps of Engineers, Lee Thomas, in his official capacity as Administrator of the United States Environmental Protection Agency, Richard K. Dawson, in his official capacity as Assistant Secretary for Civil Works, United States Army, and Jennifer Joy Wilson, in her official capacity as Assistant Administrator for External Affairs, United States Environmental Protection Agency,
Appellees,

Sierra Club, Environmental Defense Fund, National Wildlife Federation, National Audubon Society, Conservation Law Foundation of New England, Inc., Massachusetts Audubon Society, Citizens for Responsible Environmental Management, Massachusetts Society for Conservation Professionals, Audubon Society of Rhode Island, Rhode Island Association of Conservation Commissioners and Natural Resources Defense Council,
Intervenor-Defendants.

Argued March 16, 1988.

Decided June 8, 1988.

On appeal from a judgment entered October 23, 1987 in the Northern District of New York, Thomas J. McAvoy, *District Judge*, 674 F.Supp. 405, granting appellee's motion for summary judgment and denying appellants' motion for summary judgment, in an action brought by developers to challenge the final determination of the Environmental Protection Agency denying them permission to construct a shopping mall on a swamp, the Court of Appeals, Timbers, Circuit Judge, held: (1) that EPA's "market entry" theory, considering availability of alternative sites at time developer entered the market for site instead of at time it applied for permit, was consistent with both regulatory language and past practice; and (2) that EPA's interpretation, while not necessarily entitled to deference, was reasonable and thus was properly upheld by district court.

Affirmed.

George C. Pratt, Circuit Judge, filed a dissenting opinion.

Albert J. Beveridge, III, Washington, D.C. (Gary H. Baise, Virginia S. Albrecht, Marc A. Zeppetello, David M. Friedland, and Beveridge & Diamond, Washington, D.C., on the brief), for appellants.

Paul D. Kamenar, Washington, D.C. (Daniel J. Popeo, Washington, D.C., and Henry M. Holzer, Brooklyn, N.Y., on the brief), for intervenor-appellants.

Donald A. Carr, Dept. of Justice, Washington, D.C. (Roger J. Marzulla, Acting Asst. Atty. Gen., Peter R. Steenland, Jr., Margaret N. Strand, Dept. of Justice, Gail B. Cooper, E.P.A., Washington, D.C., and Ann H. Williams-Dawe, E.P.A., Boston, Mass., on the brief), for appellees.

James T.B. Tripp, Environmental Defense Fund, New York City (Michael E. Herz, Environmental Defense Fund, New York City, Michael J. Bean, Environmental Defense Fund, Washington, D.C., Hope Babcock, National Audubon Society, Washington, D.C., Robert Dreher, Sierra Club Legal Defense Fund, Washington, D.C., Jerry Jackson, National Wildlife Federation, Washington, D.C., and Peter Shelley, Conservation Law Foundation of New England, Boston, Mass., on the brief), for intervenor-appellees.

R. Sarah Compton, Carl W. Schwarz, Kurt J. Olson, and McDermott, Will & Emery, U.S. Chamber of Commerce, Washington, D.C., and Robin S. Conrad, National Chamber Litigation Center, Washington, D.C., filed a brief as amicus curiae.

Before TIMBERS, PRATT and MINER, Circuit Judges.

TIMBERS, Circuit Judge:

Appellants John A. Bersani, the Pyramid Companies, Newport Galleria Group and Robert J. Congel ("Pyramid", collectively) appeal from a judgment entered October 23, 1987 in the Northern District of New York, Thomas J. McAvoy, *District Judge*, granting summary judgment in favor of appellees, the United States Environmental Protection Agency ("EPA"), the United States Army Corps of Engineers (the "Corps"), Lee Thomas, the Administrator of the EPA, Richard K. Dawson, Assistant Secretary for Civil Works, United States Army, and Jennifer Joy Wilson, Assistant Administrator for External Affairs of the EPA (the "Federal Appellees" collectively), and denying Pyramid's motion for summary judgment. *Bersani v. EPA*, 674 F.Supp. 405 (N.D.N.Y. 1987).

This case arises out of Pyramid's attempt to build a shopping mall on certain wetlands in Massachusetts known as Sweedens Swamp. Acting under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1982), EPA vetoed the approval

by the Corps of a permit to build the mall because EPA found that an alternative site had been available to Pyramid at the time it entered the market to search for a site for the mall. The alternative site was purchased later by another developer and arguably became unavailable by the time Pyramid applied for a permit to build the mall.

On appeal, the thrust of Pyramid's argument is a challenge to what it calls EPA's "market entry" theory, i.e., the interpretation by EPA of the relevant regulation, which led EPA to consider the availability of alternative sites at the time Pyramid entered the market for a site, instead of at the time it applied for a permit. Pyramid argues principally (1) that the market entry approach is contrary to the regulatory language and past practice; and (2) that since the Corps, another agency which was jointly responsible with EPA for administering the program in question, interpreted the pertinent regulation in a different way than EPA had, and since the market entry issue does not involve environmental expertise, this Court should not defer to EPA's interpretation of the regulation. Other subordinate claims are raised by appellants as well as by two intervenors and the amicus curiae.[1]

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[1] The amicus curiae, the United States Chamber of Commerce ("Chamber of Commerce") filed a brief in support of Pyramid's position. This brief raises two points also raised in Pyramid's brief, and one new point: that EPA exceeded its authority under § 404(c) by engaging in a *de novo* review of Pyramid's compliance with the regulation in question.

The Citizens in Support of Attleboro Mall and Joseph Robichaud ("Citizens", collectively) have intervened as plaintiffs/appellants and have submitted a brief raising two issues not covered by Pyramid in its brief: (1) whether EPA exceeded its authority under the relevant statute by considering the historical and cumulative effects of discharges on other wetlands, and (2) whether EPA arbitrarily rejected Pyramid's mitigation efforts.

The Conservation Law Foundation ("CLF") has intervened as a defendant/appellee and has submitted a brief raising six points, four of

We hold (1) that the market entry theory is consistent with both the regulatory language and past practice; (2) that EPA's interpretation, while not necessarily entitled to deference, is reasonable; and (3) that EPA's application of the regulation is supported by the administrative record. We agree with the district court's conclusion that EPA's findings were not arbitrary and capricious. We also hold that Pyramid's other arguments, and the arguments of one intervenor and the amicus, lack merit.

We affirm.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

A. *Statutory and Regulatory Framework*

One of the sections of the Clean Water Act (the "Act") relevant to the instant case is § 301(a), 33 U.S.C. § 1311(a) (1982), which prohibits the discharge of any pollutant, including dredged or fill materials, into the nation's navig-

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which are covered by the Federal Appellees in their brief. In the other two points, CLF: (1) answers the arguments of the Citizens and the Chamber of Commerce, asserting that EPA's decision was wholly within its authority, and (2) asserts that in any event the appropriate remedy for any defects in EPA's decision would be a remand.

Upon reviewing each of these new points, we hold (1) that EPA's decision was wholly within its authority, and (2) that EPA did not arbitrarily reject Pyramid's efforts at mitigation but rather had ample basis to reject these efforts on the ground that they were not likely to succeed. In light of our holding with regard to the district court's decision, discussed in the body of our opinion, we need not reach the issue of whether remand would be the appropriate remedy for defects in EPA's actions.

The other arguments of the two intervenors and the amicus will be dealt with in our discussion of the arguments of Pyramid and the Federal Appellees.

able waters, except in compliance with the Act's provisions, including § 404. It is undisputed that Sweedens Swamp is a "navigable water", as defined in 33 U.S.C. § 1362 (1982), and that Pyramid's shopping center proposal will involve the discharge of dredged or fill materials.

Section 404 of the Act, 33 U.S.C. § 1344 (1982 & Supp. III 1985), focusing on dredged or fill materials, provides that the United States Army and EPA will share responsibility for implementation of its provisions. EPA and the Corps also share responsibility for enforcing the Act. 33 U.S.C. §§ 1311 (1982), 1319 (1982), 1344(n) and (s) (1982). Section 404(a) authorizes the Secretary of the Army, acting through the Corps, to issue permits for the discharge of dredged or fill materials at particular sites. 33 U.S.C. § 1344(a) (1982). Section 404(b) provides that, subject to § 404(c), the Corps must base its decisions regarding permits on guidelines (the "404(b)(1) guidelines") developed by EPA in conjunction with the Secretary of the Army. 33 U.S.C. § 1344(b) (Supp. III 1985).

The 404(b)(1) guidelines, published at 40 C.F.R. Part 230 (1987), are regulations containing the requirements for issuing a permit for discharge of dredged or fill materials. 40 C.F.R. § 230.10(a)[2] covers "nonwater dependent activ-

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[2] Section 230.10(a)(2) and (3) provide:

"(a) Except as provided under section 404(b)(2) [pertaining to navigation] no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

• • •

(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized expanded or managed in order to fulfill

ities" (i.e., activities that could be performed on non-wetland sites, such as building a mall) and provides essentially that the Corps must determine whether an alternative site is available that would cause less harm to the wetlands. Specifically, it provides that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative" to the proposal that would have a "less adverse impact" on the "aquatic ecosystem". It also provides that a practicable alternative may include "an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity." 40 C.F.R. 230.10(a)(2). It further provides that, "unless clearly demonstrated otherwise", practicable alternatives are (1) "presumed to be available" and (2) "presumed to have less adverse impact on the aquatic ecosystem". 40 C.F.R. 230.10(a)(3). Thus, an applicant such as Pyramid must rebut both of these presumptions in order to obtain a permit. Sections 230.10(c) and (d) require that the Corps not permit any discharge that would contribute to significant degradation of the nation's wetlands and that any adverse impacts must be mitigated through practicable measures.

In addition to following the 404(b)(1) guidelines, the Corps may conduct a "public interest review". 33 C.F.R. § 320.4 (1987). This public interest review is not mandatory

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the basic purpose of the proposed activity may be considered.

(3) Where the activity associated with a discharge which is proposed for a special aquatic site [defined in Subpart E to include wetlands] does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise."

under § 404, unlike consideration of the 404(b) guidelines. In a public interest review, the Corps' decision must reflect the "national concern" for protection and use of resources but must also consider the "needs and welfare of the people." *Id.*

Under § 404(c) of the Act, 33 U.S.C. § 1344(c), EPA has veto power over any decision of the Corps to issue a permit. It is this provision that is at the heart of the instant case.

Specifically, § 404(c) provides that the Administrator of EPA may prohibit the specification of a disposal site "whenever he determines, after notice and opportunity for public hearings, that the discharge of materials into such area will have an unacceptable adverse effect" on, among other things, wildlife.[3] An "unacceptable adverse effect" is defined in 40 C.F.R. § 231.2(e) as an effect that is likely to result in, among other things, "significant loss of or damage to . . . wildlife habitat". The procedure under § 404(c) begins with the Regional Administrator ("RA") who, under § 231.3(a), must notify the Corps and the applicant when it is possible he will find an "unacceptable adverse effect". If within 15 days the applicant fails to satisfy the RA that no such effect will occur, the RA must publish his proposed determination to veto the grant of a permit.

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[3] Section 404(c), 33 U.S.C. § 1344(c), authorizes the Administrator:

"to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection."

A period for public comment and an optional public hearing follows, after which the RA either withdraws the determination or submits a recommended determination to the national Administrator, whose decision to affirm, modify or rescind the RA's recommendation is the final determination of EPA for purposes of judicial review. The burden of proving that the discharge will have an "unacceptable adverse effect" is on EPA. 45 Fed.Reg. 85,336, 85,338 (1980); 44 Fed. Reg. 58,076, 58,080 (1979).

In short, both EPA and the Corps are responsible for administering the program for granting permits for discharges of pollutants into wetlands under § 404. The Corps has the authority to issue permits following the 404(b)(1) guidelines developed by it and EPA; EPA has the authority under § 404(c) to veto any permit granted by the Corps. The Corps processes about 11,000 permit applications each year. EPA has vetoed five decisions by the Corps to grant permits.

B. *Factual Background of the Sweedens Swamp Project*

Sweedens Swamp is a 49.5 acre wetland which is part of an 80 acre site near Interstate 95 in South Attleboro, Massachusetts. Although some illegal dumping and motorbike intrusions have occurred, these activities have been found to have had little impact on the site which remains a "high-quality red maple swamp" providing wildlife habitat and protecting the area from flooding and pollution.

The effort to build a mall on Sweedens Swamp was initiated by Pyramid's predecessor, the Edward J. DeBartolo Corporation ("DeBartolo"). DeBartolo purchased the Swamp some time before April 1982. At the time of this purchase an alternative site was available in North Attleboro (the "North Attleboro site"). Since Massachusetts requires state approval (in addition to federal approval) for projects that would fill wetlands, DeBartolo applied to the Massachusetts Department of Environmental Quality Engineering ("DEQE") for permission to build

on Sweedens Swamp. DEQE denied the application in April 1982.

Pyramid took over the project in 1983 while the appeal of the DEQE denial was pending. In April 1983, Massachusetts adopted more rigorous standards for approval of permits. The new standards added wildlife habitat as a value of wetlands to be protected and required the absence of a "practicable alternative". In March 1985, DEQE granted approval under the old, less stringent, regulations. The Massachusetts District Court reversed on the ground that DEQE should have applied the new regulations, but the Massachusetts Supreme Judicial Court ultimately upheld DEQE's approval. *Citizens for Responsible Environmental Management v. Attleboro Mall, Inc.*, 400 Mass. 658, 511 N.E.2d 562 (1987).

One of the key issues in dispute in the instant case is just when did Pyramid begin searching for a suitable site for its mall. EPA asserts that Pyramid began to search in the Spring of 1983. Pyramid asserts that it began to search several months later, in September 1983. The difference is crucial because on July 1, 1983—a date between the starting dates claimed by EPA and Pyramid—a competitor of Pyramid, the New England Development Co. ("NED"), purchased options to buy the North Attleboro site. This site was located upland and could have served as a "practicable alternative" to Sweedens Swamp, *if* it had been "available" at the relevant time. Thus, if the relevant time to determine whether an alternative is "available" is the time the applicant is searching for a site (an issue that is hotly disputed), and if Pyramid began to search at a time *before* NED acquired options on the North Attleboro site, there definitely would have been a "practicable alternative" to Sweedens Swamp, and Pyramid's application should have been denied. On the other hand, if Pyramid did not begin its search until *after* NED acquired options on the North Attleboro site, then the site arguably was not "available" and the permit should have

been granted. Of course it also is possible that the North Attleboro site remained "available" after NED's acquisition of the options, since Pyramid arguably could have purchased the options from NED. Moreover, since the North Attleboro site indisputably was "available" when Pyramid's predecessor, DeBartolo, purchased Sweedens Swamp, one might argue, as EPA does, that Pyramid should be held to stand in its predecessor's shoes. The district court apparently agreed with Pyramid on the issue of when Pyramid entered the market, stating that "Pyramid initially became interested in developing a shopping mall in the Attleboro area in September 1983". *Bersani v. EPA, supra,* 674 F.Supp. at 409.

In December 1983, Pyramid purchased Sweedens Swamp from DeBartolo. In August 1984, Pyramid applied under § 404(a) to the New England regional division of the Corps (the "NE Corps") for a permit. It sought to fill or alter 32 of the 49.6 acres of the Swamp; to excavate nine acres of uplands to create artificial wetlands; and to alter 13.3 acres of existing wetlands to improve its environmental quality. Later Pyramid proposed to mitigate the adverse impact on the wetlands by creating 36 acres of replacement wetlands in an off-site gravel pit.

During the review of Pyramid's application by EPA, by the Fish and Wildlife Service ("FWS") and by the Corps, Pyramid submitted information on "practicable alternatives", especially the North Attleboro site. In rejecting that site as an alternative, Pyramid asserted that building a mall there was not *feasible,* not that the site was *unavailable.* In the words of the district court, Pyramid claimed that

> "the site lacked sufficient traffic volume and sufficient access from local roads, potential department store tenants had expressed strong doubts about the *feasibility* of the site and previous attempts to develop

> the site had met with strong resistance from the surrounding community."

Bersani, supra, 674 F.Supp. at 410 (emphasis added).

In November 1984, EPA and FWS submitted official comments to the NE Corps recommending denial of the application because Pyramid's proposal was inconsistent with the 404(b)(1) guidelines. Pyramid had failed (1) to overcome the presumption of the availability of alternatives and (2) to mitigate adequately the adverse impact on wildlife. EPA threatened a § 404(c) review. Pyramid then proposed to create additional artificial wetlands at a nearby upland site, a proposal it eventually abandoned.

In January 1985, the NE Corps hired a consultant to investigate the feasibility of Sweedens Swamp and the North Attleboro site. The consultant reported that either site was feasible but that from a commercial standpoint only one mall could survive in the area. On February 19, 1985, the NE Corps advised Pyramid that denial of its permit was imminent. On May 2, 1985, the NE Corps sent its recommendation to deny the permit to the national headquarters of the Corps. Although the NE Corps ordinarily makes the final decision on whether to grant a permit, *see* 33 C.F.R. § 325.8 (1982), in the instant case, because of widespread publicity, General John F. Wall, the Director of Civil Works at the national headquarters of the Corps decided to review the NE Corps' decision. Wall reached a different conclusion. He decided to grant the permit after finding that Pyramid's offsite mitigation proposal would reduce the adverse impacts sufficiently to allow the "practicable alternative" test to be deemed satisfied. He stated:

> "In a proper case, mitigation measures can be said to reduce adverse impacts of a proposed activity to the point where there is no 'easily identifiable difference in impact' between the proposed activity (in-

cluding mitigation) versus the alternatives to that activity."

Although he did not explicitly address the issue, Wall apparently assumed that the relevant time to determine whether there was a practicable alternative was the time of the application, not the time the applicant entered the market. In other words, Wall appears to have assumed that the market entry theory was not the correct approach. For example, while addressing the traditional "practicable alternatives" analysis as an alternative ground for his decision, Wall found that the North Attleboro site was unavailable "because it has been optioned by another developer". Since the site was *not* optioned at the time EPA argues Pyramid entered the market, this language suggests (to Pyramid at least) that Wall could not have been employing the market entry approach.

On May 31, 1985, Wall ordered the NE Corps to send Pyramid, EPA and FWS a notice of its intent to grant the permit. The NE Corps complied on June 28, 1985.

On July 23, 1985, EPA's RA initiated a § 404(c) review of the Corps' decision. Following the procedure set forth in 40 C.F.R. Part 231 (discussed above), EPA published notice of its intent to prohibit the project in the *Federal Register;* held a public hearing on September 26, 1985; and permitted a period for public comment which closed on October 4, 1985. A second hearing was held on November 18, 1985.

On March 4, 1986, the RA recommended that EPA veto the permit because of adverse impacts on wildlife and available "practicable alternatives". In particular, the RA found that Pyramid had not overcome the presumption that an alternative existed, in part because Pyramid had failed to provide information on the availability of the North Attleboro site. After first refusing to provide the information, Pyramid later had claimed "there is no further or more detailed information. It simply does not

exist." The RA alternatively reasoned that the North Attleboro site had been available to DeBartolo, and that EPA should attribute this availability to Pyramid because Pyramid had benefitted from DeBartolo's application for state approval.

On May 13, 1986, EPA issued its final determination, which prohibited Pyramid from using Sweedens Swamp. It found (1) that the filling of the Swamp would adversely affect wildlife; (2) that the North Attleboro site could have been available to Pyramid at the time Pyramid investigated the area to search for a site; (3) that considering Pyramid's failure or unwillingness to provide further materials about its investigation of alternative sites, it was uncontested that, at best, Pyramid never checked the availability of the North Attleboro site as an alternative; (4) that the North Attleboro site was feasible and would have a less adverse impact on the wetland environment; and (5) that the mitigation proposal did not make the project preferable to other alternatives because of scientific uncertainty of success. In the second of these findings, EPA used what Pyramid calls the "market entry" approach.

On July 1, 1986, Pyramid commenced the instant action in the district court to vacate EPA's final determination as arbitrary and capricious. After the parties filed cross-motions for summary judgment, the newspapers reported that Pyramid intended to enter a joint venture with NED to build a mall at the North Attleboro site. Affidavits submitted concerning this development did not indicate whether Pyramid planned to continue the Sweedens Swamp project. Since the joint venture agreement was still in draft form, EPA did not take the position that the case was moot.

On October 6, 1987, the court granted EPA's motion for summary judgment. The court stated that, with regard

to the market entry theory, EPA's interpretation of its regulations was entitled to deference. This appeal followed.

For the reasons which follow, we affirm.

II.

One of Pyramid's principal contentions is that the market entry approach is inconsistent with both the language of the 404(b)(1) guidelines and the past practice of the Corps and EPA.

A.

With regard to the language of the regulations, Pyramid reasons that the 404(b)(1) guidelines are framed in the present tense, while the market entry approach focuses on the *past* by considering whether a practicable alternative *was* available at the time the applicant entered the market to search for a site. To support its argument that the 404(b)(1) guidelines are framed in the present tense, Pyramid quotes the following language:

> "An alternative is practicable if it *is* available. . . . If it is otherwise a practicable alternative, an area not *presently* owned by the applicant which *could* reasonably *be* obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity *may be* considered."

40 C.F.R. § 230.10(a)(2) (emphasis added). It then argues that EPA says "is" means "was". It cites *Gwaltney of Smithfield v. Chesapeake Bay Foundation,* 108 S.Ct. 376, 381 (1987), to indicate that the Supreme Court believes that the "most natural" reading of present tense langauge in § 505(a) of the Act refers only to the present and future.

While this argument has a certain surface appeal, we are persuaded that it is contrary to a common sense reading of the regulations; that it entails an overly literal and

narrow interpretation of the language; and that it creates requirements not intended by Congress.

First, while it is true that the language is in the present tense, it does not follow that the "most natural" reading of the regulations would create a time-of-application rule. As EPA points out, "the regulations do not indicate *when* it is to be determined whether an alternative 'is' available," (emphasis in original), i.e., the "present" of the regulations might be the time the application is submitted; the time it is reviewed; or any number of other times. Based upon a reading of the language in the context of the controlling statute and the regulations as a whole, moreover, we conclude that when the agencies drafted the language in question they simply were not thinking of the specific issues raised by the instant case, in which an applicant had available alternatives at the time it was selecting its site but these alternatives had evaporated by the time it applied for a permit. We therefore agree with the district court that the regulations are essentially silent on the issue of timing and that it would be appropriate to consider the objectives of the Act and the intent underlying the promulgation of the regulations. *Bersani, supra,* 674 F.Supp. at 412.

Second, as EPA has pointed out, the preamble to the 404(b)(1) guidelines states that the purpose of the "practicable alternatives" analysis is "to recognize the special value of wetlands and to avoid their unnecessary destruction, particularly where practicable alternatives *were* available in non-aquatic areas to achieve the basic purpose of the proposal." 45 Fed. Reg. 85,338 (1980) (emphasis added). In other words, the purpose is to create an incentive for developers to avoid choosing wetlands when they could choose an alternative upland site. Pyramid's reading of the regulations would thwart this purpose because it would remove the incentive for a developer to search for an alternative site at the time such an incentive is needed, i.e., at the time it is making the decision to select a par-

ticular site. If the practicable alternatives analysis were applied to the time of the application for a permit, the developer would have little incentive to search for alternatives, especially if it were confident that alternatives soon would disappear. Conversely, in a case in which alternatives were not available at the time the developer made its selection, but became available by the time of application, the developer's application would be denied even though it could not have explored the alternative site at the time of its decision.

Pyramid attacks this reasoning by arguing that few developers would take the risk that an available alternative site would become unavailable and that EPA's reading improperly considers the motives and subjective state of mind of the applicant. These arguments are wide of the mark. Whether most real-life developers would take such a risk is irrelevant. The point is that Pyramid's time-of-application theory is completely at odds with the expressed intent of the regulations to provide an incentive to avoid choosing wetlands. Similarly, EPA's interpretation does not require courts to investigate the subjective state of mind of a developer. EPA discusses state-of-mind issues only because it is discussing the *purpose* behind the regulations, which is concerned with incentives, and thus in fact is indirectly concerned with the developer's state of mind.

In short, we conclude that a common-sense reading of the statute can lead only to the use of the market entry approach used by EPA.

B.

With regard to the past practice of the Corps and EPA, Pyramid asserts that neither has ever applied a market entry approach. It first cites two previous final determinations of EPA, known as the "Final Determination of the Assistant Administrator for External Affairs Concern-

ing the Jack Maybank Site on Jehossee Island, South Carolina Pursuant to Section 404(c) of the Clean Water Act," April 5, 1985 ("Maybank Determination"), and the "Final Determination of the Administrator Concerning M.A. Norden Site Pursuant to Section 404(c) of the Clean Water Act," June 15, 1984 ("Norden Determination"). On the basis of these determinations, Pyramid argues that, had EPA been using a market entry approach in these cases, it would have examined whether alternatives were available at earlier times and that EPA had failed to make such an examination. Pyramid also cites *National Audubon Society v. Hartz Mountain Dev. Corp.*, 14 Envtl.L. Rep. 20724 (Envtl.L.Inst.) (D.N.J. Oct. 24, 1983), *Friends of the Earth v. Hintz*, 800 F.2d 822 (9 Cir.1986), and *Hough v. Marsh*, 557 F.Supp. 74 (D.Mass.1982), as examples of cases in which courts have upheld Corps decisions which had examined only those practicable alternatives that were available at the time of the permit review.

Our examination of these prior decisions has satisfied us, however, that the issue raised in the instant case simply has not been addressed before. In *National Audubon Society*, the actual issue was whether the alternative site had to be available to the applicant or any developer. In *Hintz*, the court, while addressing other issues, simply approved a Corps decision in which only those alternatives available at the time of the review were considered. In *Hough*, the court invalidated a permit not because the Corps had considered past alternatives but rather because it assumed that such alternatives continued to exist during the entire selection process. Similarly, the Maybank Determination in fact addressed another issue. In the Norden Determination, where about 40 possible alternative sites were identified, of which seven were available at the time of application, EPA did not address the timing issue explicitly, because it was not required to—the presence of the seven currently available alternatives made it unnecessary to reach the issue.

We believe that the issue essentially is one of first impression. We view EPA's action in the instant case as an application of the regulatory language to the specific needs of this case which arose here for the first time. We therefore hold that EPA has not acted contrary to prior practice under the regulations.

III.

We turn next to the issue of whether EPA's interpretation of the 404(b)(1) guidelines is entitled to the deference usually accorded an agency with regard to its interpretation of regulations it is charged with administering, *see EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 83 (1980), and participated in formulating. *See also United States v. Hescorp. Heavy Equip. Sales Corp.*, 801 F.2d 70, 76 (2 Cir.), *cert. denied*, 107 S.Ct. 672 (1986). The district court implied in its decision that it was according EPA such deference in examining its market entry approach.

Pyramid contends that such deference was unwarranted because two agencies—EPA and the Corps—developed and administered the regulations, and the Corps reached a different conclusion from that of EPA on the market entry issue. It asserts that, contrary to EPA's market entry approach, the "Corps' position is that the availability should be determined as of the time an application is under review." Pyramid points out that under § 404(b) the regulations are to be developed by EPA "in conjunction with" the Secretary of the Army (who acts through the Corps). It cites *General Elec. Co. v. Gilbert*, 429 U.S. 125, 144-45 (1976), for the proposition that a court must use its own judgment in construing a regulation when two agencies with responsibility for administering it reach divergent conclusions. It also contends that the Corps has greater experience with and expertise in assessing the "availability" of alternatives than EPA, because it is the Corps that makes the initial decision on thousands of applications while

EPA reviews under § 404(c) only rarely. Furthermore, Pyramid claims that the availability analysis implicates zoning, economic and financial issues, not environmental ones.

In response, EPA asserts that the Corps did not take a developed opposing policy position on the issue of what time is relevant in the "practicable alternatives" analysis. The reason for this is that the Corps, acting through General Wall, based its decision primarily on its finding that Pyramid's mitigation proposal was workable. EPA also asserts, on the issue of its expertise, that its "selective and most infrequent invocation" of its veto power underscores EPA's "seriousness" about using the veto. Finally EPA asserts that the Act's legislative history indicates that Congress intended EPA to have the "final word" on any disputes with the Corps.

While none of EPA's assertions is entirely persuasive, there also are difficulties with Pyramid's position. It is undeniable, for example, that Wall in fact did find that the North Attleboro site was "unavailable" and thus it appears that the Corps tacitly was applying a time-of-application test. On the other hand, it is possible that Wall believed that Pyramid did not enter the market until after NED had purchased the North Attleboro site. Accordingly, Wall may have found the alternative site "unavailable" under the market entry approach. Pyramid's and EPA's other arguments similarly cut both ways or are inconclusive.

Even if we are not thoroughly persuaded that EPA's interpretation was entitled to deference, however, we nevertheless conclude that the district court's decision in its favor must be upheld. As Pyramid itself points out (to the detriment of its argument), the issue of deference is separate from the issue of the standards of review of the district court and of our Court.

On appeal, we must subject the district court's judgment to plenary review, *Potenze v. New York Shipping Ass'n*,

804 F.2d 235, 239 (2 Cir.1986), *cert. denied*, 107 S.Ct. 1955 (1987), and apply the same summary judgment test as applied by the district court. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9 Cir.1987). An agency's interpretation of its own regulations raises a question of law, *White Indus. v. FAA*, 692 F.2d 532, 534 (8 Cir.1982), and thus is freely reviewable by our Court. *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1135 (5 Cir.1986).

The standard of review for the district court in this case is that the court shall set aside EPA's findings, conclusions or actions only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(A) (1982). As stated by the Supreme Court in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983),

> "[A] reviewing court may not set aside agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute. . . . The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' "

Id. at 42-43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

Applying these standards, we are convinced that EPA's market entry interpretation was reasonable, and therefore was neither "arbitrary and capricious" nor "not in accordance with law." We therefore hold that the district court correctly found that EPA's interpretation of the regulations was reasonable.

IV

Finally, we turn to Pyramid's subordinate claims, three of which warrant brief mention. Pyramid claims (1) that the market entry theory violates administrative law principles because it is not specific enough to put the public on notice of when it must consider alternative sites; (2) that EPA's application of the market entry theory was unfair in this case; and (3) that the district court exceeded its authority in supplying a rationale for EPA's decision which was not offered by EPA.

As for the claim that the market entry approach is not specific enough, Pyramid reasons that any number of points in time could constitute "entry" into the market. It speculates whether market entry occurs "from the time the first internal memorandum is written," or the time "the first consultant [is] hired," or the time the "first negotiation for a site [is] conducted." We are persuaded, however, that EPA is correct in asserting that it is unnecessary to pin down the standard to such a degree and that it would confuse things further to attempt to do so. Since the point of "entry" necessarily will vary from case to case, we believe the concept of "market entry" is the best method and is specific enough to put a developer on notice of when it should be considering alternative sites.

With regard to the claim that EPA applied the market entry approach unfairly in the instant case, Pyramid asserts that the way EPA announced a "new" standard (the market entry rule) and then applied it "retroactively" in this case was fundamentally unfair. It also asserts that EPA's failure to address evidence that the North Attleboro site was unavailable at the time of Pyramid's market entry was unfair. According to Pyramid, such fundamental unfairness violates the principles underlying the Administrative Procedure Act. *See Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

As we held above, however, we view EPA's interpretation of the rules as a reasonable application of the regulatory language to the unique facts of this case—a case in which it became necessary for the first time to reach the issue of *when* availability should be determined. EPA did not create and announce a "new" standard and apply it retroactively to Pyramid. Rather, EPA interpreted the law to apply it to the facts of this case.

Moreover, we believe the extensive administrative record supports a finding that the North Attleboro site was available to Pyramid when it entered the market. Even if Pyramid were found not to have entered the market until September 1983, after NED had acquired options to purchase the North Attleboro site, it does not necessarily follow that the site was unavailable. Aside from the fact that NED did not acquire all the options for the North Attleboro site until June 1984, it also was possible for Pyramid to attempt to purchase the options from NED. The record shows no such attempts to purchase the site, or even to investigate its availability. Alternatively, even though the district court apparently was not persuaded by it, there also is evidence in the record to show that Pyramid actually entered the market in the Spring of 1983, before NED had purchased its options. Finally, the evidence shows that the North Attleboro site had been available to DeBartolo, Pyramid's predecessor. EPA could reasonably have determined that Pyramid should be held to "stand in the shoes" of DeBartolo, especially since it was able to obtain state approval of the project under the less-stringent state standards that had originally applied to DeBartolo.

Finally, Pyramid contends that the district court improperly supplied a rationale for EPA's final determination that EPA itself did not articulate. It is true that the district court rejected one of EPA's grounds for finding that Pyramid had failed to rebut the presumption that a practicable alternative was available. This ground was that the

"trade custom" of developers was to investigate a potential development site for many months before purchasing it. EPA reasoned that, if Pyramid had purchased Sweedens Swamp in December 1983, it was unlikely, in view of the trade custom, that it had entered the market only eight weeks earlier—in September 1983—as Pyramid claimed. The court accepted what it characterized as EPA's finding that the North Attleboro site in any event was still available in September 1983, when even Pyramid admitted it had entered the market.

Pyramid asserts that EPA did not make this finding and that the court improperly supplied a rationale for EPA's determination that EPA did not articulate itself. This assertion fails, however, because EPA *did* make the finding. In its final determination it stated several reasons why it believed the North Attleboro site should be deemed to have been "available". It stated, among other things, (1) that NED could "have been talked into relinquishing its interest" in the site even in September or December 1983; (2) that Pyramid never investigated the availability of the North Attleboro site because it believed it was too far from the highway; and (3) that Pyramid had refused to provide EPA with information on the time of its entry into the market, stating that such information "simply does not exist". Thus, the trade custom ground to support the finding of availability was accompanied by several other grounds in the final determination. The district court therefore did not "supply" a rationale for EPA. Rather, EPA supplied several for itself.

We affirm the district court's decision in all respects.

V.

To summarize:

We hold (1) that the market entry theory is consistent with both the regulatory language and past practice; (2) that EPA's interpretation, while not necessarily entitled

to deference, is reasonable and its application of its rule is supported by the record; and (3) that Pyramid's other arguments lack merit.

Affirmed.

GEORGE C. PRATT, Circuit Judge, dissenting:

Finding that a "common-sense reading" of 33 U.S.C. § 1344(c) "can lead only to the use of the market entry approach", the majority today holds that in determining whether an "alternative *is* available", EPA is to look, not at the present circumstances and most current data, but rather at circumstances and data which existed, perhaps years earlier, when the developer "entered the market". This market entry theory approaches a sensitive environmental problem through a time warp, it ignores the statute's basic purpose, and it creates unfair and anomalous results. I therefore dissent.

I. *The Legislative History and Purpose of Section 1344.*

Section 1344 was enacted by congress in 1972 as part of a broad-based improvement to a national water policy that had been, as congress termed it, "inadequate in every vital aspect." S.Rep. No. 414, 92 Cong., 2d Sess. 7 (1972). Specifically, the section was intended to address the delicate balance between those activities which endanger "marine environment [and] ecological systems" on the one hand, and those activities "essential for the maintenance of interstate and foreign commerce" on the other. Conf.Rep. No. 1236, 92nd Cong., 2d Sess. 43-44 (1972).

Section 1344 is unusual: its primary purpose is neither to punish those who illegally infringe on national wetlands, nor, as the majority opines, "to provide an incentive [to developers] to avoid choosing wetlands". To the contrary, the statute is directed at the land itself without any regard to whether the party seeking to develop it has clean hands. Thus, if the "biological integrity" of a specific wetland

area outweighs the "interstate and foreign commerce" advantages that the site could provide, the site should remain undeveloped regardless of which developer is seeking the permit. *See* S.Rep. No. 414, 92nd Cong., 2d Sess. 7 (1972); Conf.Rep. No. 1236, 92nd Cong., 2d Sess. 43-44 (1972). Conversely, if the balance weighs in favor of commerce or other economic advantages, then the land should be developed, again regardless of the specific developer involved. *Id.* In short, congress designed the section to preserve the environment consistent with reasonable accommodation to the economic and social needs of the public; it was not concerned with the identities or past activities of particular developers.

II. *The Purpose of Section 1344 and the Market Entry Theory.*

In this case I have no problem with EPA's basic approach. It conscientiously attempted to weigh the economic advantages against the ecological disadvantages of developing Sweedens Swamp and, in approaching this determination, it properly looked to alternate available sites. However, EPA went wrong—seriously wrong—when it adopted the market entry theory to decide whether an alternate site was available. By focusing on the decision-making techniques and tactics of a particular developer, instead of the actual alternatives to disturbing the wetland, EPA ignored the statute's central purpose.

The market entry theory in effect taints a particular developer with respect to a particular site, while ignoring the crucial question of whether the site itself should be preserved. Under the market entry theory, developer A would be denied a permit on a specific site because when he entered the market alternatives were available, but latecomer developer B, who entered the market after those alternatives had become unavailable, would be entitled to a permit for developing the same site. In such a case, the theory no longer protects the land, but instead becomes

a distorted punitive device: it punishes developer A by denying him a permit, but grants developer B a permit for the same property—and the only difference between them is when they "entered the market".

The market entry theory has further problems. In this case, for example, if a Donald Trump had "entered the market" after NED took the option on the North Attleboro site and made it unavailable, under EPA's approach he apparently would have been entitled to a permit to develop Sweedens Swamp. But after obtaining the permit and the land, could Trump then sell the package to Pyramid to develop? Or could he build the mall and then sell the developed site to Pyramid? If, on the one hand, the answer to these questions is "yes", then the market entry theory is no more than a troublesome mirage that could easily be circumvented by Pyramid's using a second party to buy the land and obtain the permit. If, on the other hand, the answer is "no", then Pyramid is forever tainted, forever prohibited—somewhat like a bill of attainder—from owning this particular site, and only because at some time in the past it had "entered the market" while an alternative was still available.

Furthermore, in a business that needs as much predictability as possible, the market entry theory will regrettably inject exquisite vagueness. When does a developer enter the market? When he first contemplates a development in the area? If so, in what area—the neighborhood, the village, the town, the state or the region? Does he enter the market when he first takes some affirmative action? If so, is that when he instructs his staff to research possible sites, when he commits money for more intensive study of those sites, when he contacts a real estate broker, when he first visits a site, or when he makes his first offer to purchase? Without answers to these questions a developer can never know whether to proceed through the expense of contracts, zoning proceedings, and EPA applications. Such a vague standard as "market entry" falls

far short of the requirement that an agency articulate its standards with sufficient clarity so that the affected community may know what those standards are. *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 48 (1983); *Port Terminal Railroad Ass'n v. United States*, 551 F.2d 1336, 1344-45 (5th Cir. 1977).

Even more important, the result reached by EPA and the majority is contrary to what congress sought to achieve when it passed § 1344. Pyramid has been "punished" for beginning its quest when the North Attleboro site was still available; but Sweedens Swamp nevertheless could be destroyed through an identical application by some other developer who happened to enter the market after that alternate site became unavailable. And this would be so even if another, better-suited site should become available after the second developer enters the market, because the "common sense" market entry theory looks only, and blindly, to the alternatives available at the time the applicant "entered the market".

III. *The Proper Theory for Determining Whether an Alternate Site is Available.*

Since congress delegated to EPA the responsibility for striking a difficult and sensitive balance among economic and ecological concerns, EPA should do so only after considering the circumstances which exist, not when the developer first conceived of his idea, nor when he entered the market, nor even when he submitted his application; rather, EPA, like a court of equity, should have the full benefit of, and should be required to consider, the circumstances which exist at the time it makes its decision. This is the only method which would allow EPA to make a fully informed decision—as congress intended—based on whether, at the moment, there is available a site which can provide needed economic and social benefits to the public, without unnecessarily disturbing valuable wetlands.

Such a "time of decision" theory is reinforced by the present-tense language of the regulation, which commands EPA to determine whether an alternate site "is available". *See Gwaltney of Smithfield v. Chesapeake Bay Foundation,* 108 S.Ct. 376, 381 (1987) (present tense language in regulation means agency should apply that regulation to present, not past, circumstances). It is also supported by the express statements of congress when it passed the statute, and, I would submit, by true "common sense". Any agency given the unenviable task of balancing essentially incomparable factors in determining what is in the public's best interest, should look to the most up-to-date data, and evaluate the most current circumstances. Any other analysis would effectively tie the agency to an irrelevant date in the past, when the question to be decided is how to balance the environmental and commercial interests of the present and the future.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 10007

8 June, 1988

RE: BERSANI v EPA

Docket No.: 87-6275, 87-6295

Gentlemen:

The court has rendered a decision in the above-entitled case. The decision of the district court has been
Judgment affirmed by published signed opinion.
Dissenting by published signed opinion.
Judgment filed.

A copy of the opinion will be mailed to you. Additional copies of the opinion may be obtained from this office in accordance with §0.17(7) of the rules of this court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and a mandate will issue only to the District Court in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39 of the Federal Rules of Appellate Procedure requiring the itemized and verified bill of costs, if any, to be filed with proof of service, within 14 days after entry of judgment.

Very truly yours,

ELAINE B. GOLDSMITH, Clerk

by /s/ DONNA J. MORGAN
Deputy Clerk

APPENDIX B

CLERK'S OFFICE
United States District Court
FOR THE
ND/NY

Civil Action No. 85-CV-772

John A. Bersani, et al

vs.

U.S. EPA, et al

There was entered on the docket Oct. 23, 1987

JUDGMENT: Defts' motionf/summary judgment is granted;
Pltfs' motion f/summary judgment is denied.

J.R. SCULLY, CLERK

UNITED STATES DISTRICT COURT,
N.D. New York.

No. 86-CV-772.

John A. BERSANI, Newport Galleria Group, Robert J. Congel and the Pyramid Companies,

Plaintiffs,

and

Citizens in Support of Attleboro Mall and Joseph Robichaud,

Intervenor-Plaintiffs,

and

Home Builders Association of Massachusetts,

Intervenor-Plaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; United States Army Corps of Engineers; Lee Thomas, in his official capacity as Administrator of the United States Environmental Protection Agency; Richard K. Dawson, in his official capacity as Assistant Secretary for Civil Works, United States Army; and Jennifer Joy Wilson, in her official capacity as Assistant Administrator for External Affairs, United States Environmental Protection Agency,

Defendants,

and

Conservation Law Foundation of New England, Environmental Defense Fund, National Audubon Society, Sierra

Club Legal Defense Fund, and National Wildlife Federation, Intervenor-Defendants.

Oct. 6, 1987

Shopping mall developers brought action to challenge final determination of Environmental Protection Agency that denied permission to construct shopping mall on swamp. Agency moved for summary judgment. The District Court, McAvoy, J., held that: (1) Agency could consider avoidability of loss in conjunction with its magnitude in determining whether environmental effect was unacceptable and significant; (2) Agency properly concluded that alternative to construction of mall on swamp was feasible and available; and (3) Agency did not act arbitrarily in concluding that significant loss of wildlife resources would result from construction of mall on swamp.

Motion granted.

Beveridge & Diamond, P.C., Washington, D.C., Levine, Gouldin & Thompson, Binghamton, N.Y., for plaintiffs; Gary H. Baise, Virginia S. Albrecht, Marc Zeppetello, Washington, D.C., David M. Gouldin, Binghamton, N.Y., of counsel.

Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, Boston, Mass., for intervenor-plaintiff Home Builders Ass'n of Massachusetts; Michael S. Gardener, of counsel.

Paul D. Kamenar, Washington, D.C., for intervenor-plaintiffs Citizens in Support of Attleboro Mall and Joseph Robichaud.

Lawrence R. Liebesman, U.S. Dept. of Justice, Land and Natural Resources Div., Washington, D.C, for defendants.

Gail B. Cooper, Office of General Counsel, E.P.A., Washington, D.C., for defendants.

Ann Williams-Dawe, Boston, Mass., for defendants U.S. E.P.A.

James T.B. Tripp, New York City, for defendant-intervenor Environmental Defense Fund.

Robert Dreher, Washington, D.C., for defendant-intervenor Sierra Club Legal Defense Fund.

McDermott, Will & Emery, Washington, D.C., for amicus curiae United States Chamber of Commerce; R. Sarah Compton, of counsel.

Chernin & Gold, Binghamton, N.Y., for amicus curiae U.S. Chamber of Commerce; Donald M. Flanagan, of counsel.

DECISION AND ORDER

McAVOY, District Judge.

Plaintiffs John A. Bersani, the Pyramid Companies[1], Robert J. Congel and the Newport Galleria Group[2] have brought this action challenging a "Final Determination" rendered by the defendant United States Environmental Protection Agency (the "EPA") on May 13, 1986, pursuant to Section 404(c) of the Clean Water Act, 33 U.S.C. section 1344(c).[3] This Final Determination vetoed a decision rendered by the defendant United States Army Corps of Engineers (the "Corps") in June 1985, which decision granted Pyramid permission to construct a shopping mall in certain wetlands, known as "Sweden's Swamp," located in South Attleboro, Massachusetts. Pyramid seeks an order from

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[1] Pyramid is an association of partnerships which is in the business of developing, constructing and operating shopping centers in the Northeastern United States.

[2] The plaintiffs will be collectively referred to as "Pyramid."

[3] The EPA Administrator delegated the authority to make a final decision regarding permits issued under Section 404(a) of the Act to the Assistant Administrator of External Affairs at the time of the proceeding at issue. This final determination constitutes final agency action under Section 404(c) of the Act for the purposes of judicial review. 40 C.F.R. sections 231.5 and 231.6.

this Court vacating the EPA's determination on the grounds that it is arbitrary, capricious and otherwise not in accordance with the law. *See* 5 U.S.C. sections 704, 706. The court has before it plaintiffs' and defendants' cross-motions for summary judgment.[4]

BACKGROUND

1. Statutory and Regulatory Framework

The Clean Water Act (the "Act"), 33 U.S.C. sections 1251 *et seq.*, the basic federal legislation controlling water pollution, embodies Congress' effort to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. section 1251. Section 301(a) of the Act, 33 U.S.C. section 1311(a), forbids the discharge of any pollutant into "navigable waters"[5] unless permitted by the Army Corps of Engineers pursuant to Section 404. *See* 33 U.S.C. section 1344.

Section 404(a) authorizes the Secretary of the Army, acting through the Corps, to issue permits for the discharge of dredged or fill material at specified disposal

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[4] Both Intervenor-Plaintiffs and Intervenor-Defendants have submitted motions for summary judgment. The arguments of the former are incorporated into the discussion concerning the plaintiffs' motion and the arguments of the latter are incorporated into the discussion regarding the defendants' motion.

Oral argument on these motions was heard by this court on April 2, 1987. Thereafter, Intervenor-Defendants' raised the question of whether this lawsuit was moot. After three months of discovery, the parties withdrew their assertion of mootness.

[5] Section 502 of the Act defines navigable waters as "waters of the United States." 33 U.S.C. section 1362(7). There is no dispute that the wetlands comprising Sweden's Swamp are navigable waters. *See* 33 C.F.R. section 323.2. Nor is there any dispute that the plaintiff's proposal involves the discharge of dredged and fill materials, which are pollutants within the meaning of the Act, into those waters. *See* 33 U.S.C. section 1362(6) (pollutant includes dredged spoil).

sites. 33 U.S.C. section 1344(a). Criteria known as the Section 404(b) guidelines developed by the EPA, in conjunction with the Corps, govern these permitting decisions. 33 U.S.C. section 1344(b).[6] Generally, the Corps must employ a "practicable alternative" analysis in determining whether to allow a proposed discharge. 40 C.F.R. section 230.10 provides, in part:

> (a) Except as provided under section 404(b)(2) [pertaining to navigation] **no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem**, so long as the alternative does not have other significant adverse environmental consequences.
>
> (2) **An alternative is practicable if it is available and capable of being done, after taking into account cost, existing technology, and logistics in light of overall project purposes**. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.
>
> (3) Where the activity associated with a discharge which is proposed for a special aquatic site [defined in Subpart E to include wetlands] does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), **practicable alternatives that do not involve special aquatic sites are presumed to be available unless clearly demonstrated otherwise**. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to

[6] The section 404(b)(1) guidelines are published at 40 C.F.R. Part 230.

> have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

40 C.F.R. sections 230.10(a)(2) and (3) (emphasis added).[7]

When the proposed discharge involves a special aquatic site such as wetlands, a more stringent standard is imposed. Indeed, Section 230.10(a)(3) creates a presumption that a practicable alternative exists when the discharge involves wetlands and the activity, here a shopping mall, is not "water dependent." Then the applicant must "clearly demonstrate" that no such alternative does in fact exist.

Section 404(c) grants the Administrator of the EPA authority to prohibit, deny or restrict a Corps-issued permit for the use of a specific site when the Administrator determines that the proposed discharge "will have **an unacceptable adverse effect on** municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), **wildlife**, or recreational areas." 33 U.S.C. section 1344(c) (emphasis added). An "unacceptable adverse effect" is one which has an "impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water) or **significant loss of or damage to** fisheries, shellfishing, or **wildlife habitat** or recreation areas." 40 C.F.R. section 231.2(e) (emphasis added). This "veto" power must be exercised in accordance with established procedure. *See* 40 C.F.R. Part 231.

2. Procedural History

Pyramid initially became interested in developing a shopping mall in the Attleboro area in September 1983, and

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[7] The other Section 404(b)(1) criteria which must be satisfied before a permit may issue are (1) compliance with other applicable laws, (2) the absence of significant degradation of the Nation's waters, and (3) the adequate mitigation of potential adverse impacts. *See* 40 C.F.R. sections 230.10(b)-(b).

focused its attention on an 82-acre site in South Attleboro about one-fourth mile north of the Rhode Island border. Although the project contemplated altering or filing 32.2 acres of 49.6 acres of wetlands, the plan also called for excavating 9.0 acres of uplands (non-wetlands) to create new wetlands and altering an existing 13.3 acres of wetlands to enhance its value for wildlife, fisheries and other quality maintenance.[8] Another 4.0 acres of existing wetlands would remain undisturbed.[9] Upon completion of construction, 26 acres of wetlands including marsh areas, red maple swamp and open water would remain. Additionally, Pyramid proposed an off-site mitigation project which would result in the creation of 36 acres of replacement wetlands in an abandoned gravel pit.[10]

State Proceedings

In April 1982, the Massachusetts Department of Environmental Quality Engineering (MDEQE) denied state permission to construct a mall at the Sweden's Swamp site to Pyramid's predecessor, the Edward J. DeBartolo Corporation. The DeBartolo Corporation requested an adjudicatory hearing, prior to which Pyramid assumed control of the project. In March 1985, the MDEQE issued a

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[8] The May 13, 1986 Final Determination of the Assistant Administrator for External Affairs (FD) is document H-119 in the certified index to the Administrative Record. The March 5, 1986, Recommendation of the EPA Regional Administrator (RD) is document B-25 in the certified index. The Statement of Findings and Environmental Assessment of the Corps (SOF/EA) is document B-16 in the certified index. All other documents will be referred to by the number assigned them in the certified index.

[9] The alteration of these additional 13.3 acres is necessary to provide onsite capability for storage and treatment of stormwater runoff from the development. FD, Plaintiff's Exhibit B, at 5; B-2, "Section 404 Application," at 31-64.

[9] SEOF/EA at 1.

[10] FD at 5; C-54, "Final Report on Mitigation Site," at 1-6.

Superseding Order of Conditions which overturned the initial denial and authorized the project.[11] This decision was appealed on the ground that the MDEQE had improperly reviewed Pyramid's project under the state's 1978 wetlands protection regulations rather than under the more stringent regulations which had taken effect in April 1983. On September 30, 1986, a state court rule that the MDEQE's decision to grandfather the project was error and remanded the matter to the MDEQE to determine the rights of the parties under the 1983 regulations. As a consequence of this ruling, the new regulations, which prohibit the filling of more than 5,000 square feet of bordering vegetated wetlands, applied to Pyramid's proposal, *see Laurie Carroll v. DEQE,* No. 76012, (Mass.Super.Ct. September 30, 1986), and barred its implementation. This decision was reversed on appeal. *See Citizens for Responsible Environmental Management v. Attleboro Mall, Inc.,* 400 Mass. 658, 511 N.E.2d 562 (1987).

Federal Proceedings

In May 1984, the Corps, the Fish and Wildlife Service and the EPA held a meeting with Pyramid wherein Pyramid's proposal was discussed and compared to that of its predecessor, the DeBartolo Corporation. Pyramid requested that the project be authorized under a Corps "nationwide permit," a general permit requiring no application or public review. At that time, the EPA informed Pyramid of the rebuttable presumption that practicable, less environmentally damaging alternatives exist for non-water dependent projects located in wetlands. RD at 3. *See* 40 C.F.R. section 230.10(a). Thereafter, the Corps exercised its discretionary authority and required Pyramid to apply for an individual Section 404(a) permit.

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[11] The state regulations differ from the federal regulations in that they do not include the protection of wildlife habitat or the existence of practicable alternatives as considerations. *See* RD at 5.

In connection with its August 1984, Section 404(a) application, Pyramid submitted information concerning practicable alternative sites for its shopping mall.[12] A site three miles north in North Attleboro, Massachusetts was chiefly considered by the Corps and the EPA.[13] Pyramid relied on several factors in concluding that the North Attleboro site was not a practicable alternative; namely, the site lacked sufficient traffic volume and sufficient access from local roads, potential department store tenants had expressed strong doubts about the feasibility of the site and previous attempts to develop the site had met with strong resistance from the surrounding community.[14] In November 1984, after Pyramid had first presented its offsite mitigation proposal to convert a gravel pit into wetlands, the EPA recommended that the Corps deny the permit because of Pyramid's perceived failure to overcome the presumption that a less environmentally damaging practicable alternative existed. In January 1985 the Corps retained a consultant to examine the practicability of a mall at the North Attleboro site and the Corps and the EPA conducted an on-site investigation of the North Attleboro property. RD at 5. As a result, the Corps advised Pyramid that refusal of its permit was imminent. *Id.* In April 1985, Pyramid presented its plan for the creation of 36 acres of new wetlands in an effort to mitigate the loss which would occur at Sweden's Swamp.[15]

On May 2, 1985, the Division Engineer of the New England Division of the Army Corps sent his recommen-

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[12] At this time, Pyramid had not yet proposed any off-site mitigation. B-2; B-4.

[13] RD at 4; B-2; B-173, "Feasibility Analysis" prepared for State Properties of New England (New England Development Co); B-226, "Letter dated December 10, 1984 from State Properties of New England to Corps, EPA and FWS."

[14] B-2 at 13-15; RD at 34-37.

[15] RD at 5. Pyramid eventually dropped the site from consideration.

dation on Pyramid's application to the Director of Civil Works, Major General Wall, at Corps Headquarters in Washington, D.C. This recommendation urged that the permit be denied because a practicable alternative with a less adverse effect on the aquatic ecosystem existed.[16] In his review of the application, Major General Wall concluded:

> In a proper case, **mitigation measures can be said to reduce adverse impacts** of a proposed activity to the point where there is no "easily identifiable difference in impact" between the proposed activity (including mitigation) versus the alternatives to that activity. In such a case, mitigation measures would have made a contribution to the satisfaction of 40 C.F.R. 230.10(a) [the practicable alternatives test].

B-13 at 5 (emphasis added); SOF/EA, Views of the Chief of Engineers at 5. Under this interpretation, proposed mitigation at one site would suffice to establish that no less damaging practicable alternative existed. However, Major General Wall also employed a traditional analysis of the practicable alternatives and found:

> [F]rom the point of view of the applicant in this case, it appears that the North Attleboro site is not available. The north site is controlled by a competitor who has an interest in developing a regional shopping mall in the same trade area as the applicant. Even if it were available to the applicant, he makes a convincing argument that it would not successfully fulfill the purposes of his proposed project, from his particular point of view.

B-13 at 1; SEOF/EA, Views of Chief of Engineers at 1.

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[16] RD at 6; B-11, "Corps Recommendation dated May 2, 1985"; B-12, "Corps Recommendation."

Although Sweden's Swamp is characterized in this report as a wetland of relatively low value and degraded by uncontrolled use and by dumping of solid waste, its function as a wildlife habitat is recognized. *Id.* at 2. Major General Wall directed the New England Division of the Corps to prepare a notice of intent to issue the permit and to reconcile its findings with the foregoing determination. *Id.*

Accordingly, the Corps concluded that no practicable alternative to the South Attleboro site existed because the North Attleboro site was not available to Pyramid and substantial doubt existed as to whether the site would fulfill Pyramid's purpose. Although the Corps determined that the proposed project would not have an adverse effect on water quality, flood control or drinking water supplies, it expressed concern that the proposed reduction in on-site wetland acreage "could cause substantial adverse impact on local stocks of those species associated with forested wetland cover type . . . (i.e., red-shouldered hawk, small birds, small mammals such as skunk, possum and raccoon, and certain reptiles and amphibians.") SOF/EA at 16. The Corps, therefore, conditioned the issuance of any permit specifying Sweden's swamp as a disposal site upon the Corps' approval of Pyramid's mitigation efforts. *Id.* at 36.

On June 28, 1985, the Division Engineer notified the regional offices of the EPA and the United States Fish and Wildlife Service (FWS) of the Corps' intent to issue a permit to Pyramid.

EPA's Decision

On July 23, 1985, the EPA's Regional Administrator notified the Corps and Pyramid that he intended to initiate Section 404(c) proceedings.[17] The EPA based this decision upon its belief that an unacceptable adverse effect to wild-

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[17] RD at 7; B-316.

life could result from filling Sweden's Swamp. On March 4, 1986, the Regional Administrator made a "Recommended Determination" to prohibit the specification of Sweden's Swamp as a disposal site for dredged or fill material. The Recommendation was based upon the finding that Pyramid's project was likely to have unacceptable adverse impacts on the wildlife habitat at Sweden's Swamp. On May 13, 1986, the EPA issued its Final Determination prohibiting the specification of Sweden's Swamp as a disposal site for fill material.

The Final Determination described Sweden's Swamp as a typical, well-established functioning red maple swamp which provides excellent wildlife habitat for a variety of birds, mammals, and amphibians, and provides flood storage capacity, groundwater discharge and water purification. FD at 30. It further found that the destruction of the wetlands proposed by Pyramid would adversely affect wildlife by driving away or killing animals currently living there. *See* FD at 10-12. The EPA declared:

> In determining whether these adverse impacts are unacceptable [within the meaning of section 404(c)], it is relevant to examine next the avoidability of this wetland loss by reviewing whether there are practicable, less environmentally damaging alternatives to the proposed project.

FD at 13.

In the EPA's opinion, another less environmentally damaging site in the area, i.e., the North Attleboro site, was a feasible alternative which had been available at the time Pyramid initially selected a site for its project. FD at 16-26, 31. Thus, the EPA reasoned that any adverse effects resulting from Pyramid's project were avoidable and were therefore unacceptable within the meaning of Section 404(c). The Final Determination concluded that "based on the excellent wildlife value of the wetland . . . its site and setting, the avoidability of the loss, and the significance

of such areas in Massachusetts, . . . filling Sweden's Swamp to build the proposed mall would have unacceptable adverse effects within the meaning of section 404(c)." FD at 31.

DISCUSSION

I. Summary of Arguments

The plaintiffs contend that the EPA's decision to deny the permit is incorrect as a matter of law because (1) the EPA impermissibly relied on the "avoidability" of environmental impacts in determining their "unacceptability" under Section 404(c) and (2) the EPA impermissibly reconsidered the Section 404(b) availability question and backdated that inquiry.[18] Plaintiffs also argue that even if the EPA's statutory and regulatory interpretations are upheld as reasonable, the EPA's conclusion was arbitrary and capricious. The defendants, on the other hand, argue that Section 404(c) clearly allows the EPA to prohibit the filling of a wetland where that filling would have an unacceptable adverse impact on wildlife. The EPA contends that it was authorized to consider the Section 404(b)(1) guidelines in determining whether the environmental impacts were unacceptable and that its decision to assess the practicable alternatives available at the time of project planning was proper and consistent with the Act's and the regulations' goals.

2. Standard of Review

As noted, the court has before it now the parties' cross-motions for summary judgment. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R.Civ.P. 56(c). The facts in this case

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[18] The plaintiffs also allege that the EPA impermissibly amended a regulation without the procedures mandated by the Administrative Procedure Act. The court rejects this contention.

are undisputed. In reviewing the EPA's decision, the court must engage in a two-fold inquiry and determine (1) whether the EPA's interpretation of Section 404 and its implementing regulations was reasonable and (2) whether the EPA's application of this interpretation to the facts was rational.

An agency's interpretation of the statute and regulations it is charged with administering is entitled to deference. *See EPA v. National Crushed Stone Ass'n.*, 449 U.S. 64, 83, 101 S.Ct. 295, 307, 101 S.Ct. 295, 307, 66 L.Ed.2d 268 (1980). This is also true when the agency participated in formulating a disputed regulation. *See United States v. Hescorp. Heavy Equip. Sales Corp.*, 801 F.2d 70, 76 (2d Cir.1986) (treasury regulation construed) (citing *Miller v. Youakim*, 440 U.S. 125, 144, 99 S.Ct. 957, 968, 59 L.Ed.2d 194 (1979)). Its interpretation need not be the only reasonable one, and the court must uphold a reasonable interpretation, even if the court would not have reached the same conclusion in the first instance. A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency when a "statute is silent or ambiguous with respect to the specific issue. [Then] the question for the court is whether the agency's answer is based upon a permissible construction of the statute." The court, must, however, reject administrative constructions which are contrary to clear congressional intent. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 121, 131, 106 S.Ct. 455, 461, 88 L.Ed.2d 419 (1985); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 126, 105 S.Ct. 1102, 1108, 84 L.Ed.2d 90 (1985); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984); *Biggs v. Lyng*, 823 F.2d 15, 18 (2d Cir.1987).

Because the Clean Water Act does not set forth the standards for review of the EPA's substantive decisions, the court must look to the standards articulated in the

Administrative Procedure Act for guidance. *See Avovelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897 (5th Cir.1983). The proper inquiry for the court is whether the EPA's Final Determination is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law." *See* Administrative Procedure Act section 10(e), 5 U.S.C. section 706(2)(A); *Buttrey v. United States,* 690 F.2d 1170, 1183-85 (5th Cir.1982), *cert. denied,* 461 U.S. 927, 103 S.Ct. 2087, 77 L.Ed.2d 298 (1983). In undertaking this task, the court must remain mindful of the carefully circumscribed nature of its function. In *Motor Vehicle Mfrs. Ass'n v. State Farm Auto Ins. Co.,* 463 U.S. 29, 42-43, 103 S.Ct. 2856, 2866-67, 77 L.Ed.2d 443 (1983), the Supreme Court delineated the boundaries of the court's review in applying the arbitrary and capricious standard.

> [A] reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute . . . The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 [83 S.Ct. 239, 246, 9 L.Ed.2d 207] (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285; [95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974)]; *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 [91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971)]. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors

> which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to agency expertise.

Accord Sierra Club v. United States Army Corps of Engineers, 772 F.2d 1043, 1051 (2d Cir.1985); *Avovelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 904 (5th Cir.1983); *Great Salt Lake Minerals and Chems. v. Marsh,* 596 F.Supp. 548, 553 (D.Utah 1984). In reviewing the EPA's determination of the facts in the case at bar, the court is limited to a review of the administrative record. *Camp v. Pitts,* 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973); *accord Buttrey v. United States,* 690 F.2d 1170, 1184 (5th Cir.1982) (reviewing decision of Corps under Section 404(b) Guidelines). Keeping these principles in mind, the court now turns to an examination of the issues at hand.

3. Use of Section 404(b)(1) Guidelines in Section 404(c) Review

Pyramid contends that the avoidability of potential adverse environmental impacts of a proposed disposal of fill material may not be considered in evaluating the **unacceptability** of those impacts and challenges the EPA's use of this criterion. Pyramid would have this court adopt a narrow construction of Sections 404(b) and (c) and the regulations promulgated thereunder. Pyramid contends that the EPA may *not* consider nonenvironmental findings already made by the Corps at the permitting stage in determining whether a proposal will have unacceptable adverse environmental results within the meaning of Section 404(c) and 40 C.F.R. section 231.2(e). The EPA, on the other hand, argues that the use of the "practicable alternatives" test set forth in the Section 404(b)(1) guidelines governing the Corps' decision are equally applicable

to an EPA decision under Section 404(c). Moreover, the EPA asserts that independent consideration of the "practicable alternatives" test was proper.

Statutory Language

Section 404(c) allows the EPA to forbid specification of a particular disposal site when it determines that a proposed discharge "will have an unacceptable adverse effect." 33 U.S.C. section 1344(c). The statute itself restricts the EPA in only two ways. First, the EPA must provide for notice and a public hearing, which it undeniably did in the case at bar, and second, the EPA must evaluate unacceptable adverse effects in terms of municipal water supplies, shellfish beds and fishery areas, wildlife or recreation areas. 33 U.S.C. section 1344(c). The 404(c) regulations reiterate this latter limitation and define an "unacceptable adverse effect" as an "impact on an aquatic or wetland ecosystem which is likely to result in significant loss of or damage to" any of the environmental interests enumerated in Section 404(c), including wildlife areas.

Pyramid contends that neither the statute itself nor the implementing regulations authorize the EPA to take into account the existence of a "practicable alternative" when making a determination that a proposed project will have an unacceptable adverse impact and result in significant degradation to one of the enumerated environmental interests. Section 404(c) does not define the term "unacceptable adverse effects" or specify the factors relevant to an "unacceptability" determination. On the other hand, nothing in the statute prohibits the use of the 404(b)(1) guidelines in making that determination. In addition, the Section 404(c) regulations note that the EPA should consider the "relevant portion of the [404(b)] guidelines" in making a Section 404(c) unacceptability determination. 40 C.F.R. section 231.2(e).

These guidelines are based in part on the Section 403(c) criteria regulating ocean discharges. Section 403(c) iden-

tifies a broad range of factors to be considered by the Administrator in promulgating guidelines under Section 403(c).[19] Section 403(c)(1)(F) includes the availability of other "possible locations and methods of disposal" as a factor. The 404(b)(1) guidelines likewise mandate consideration of the availability of other possible locations in order to minimize unnecessary destruction of aquatic resources. Under Pyramid's analysis, however, the only relevant portions of the 404(b)(1) guidelines are those which directly pertain to the five resources listed in Section 404(c).

The court rejects Pyramid's contention that the fact that Section 403(c) and Section 404(b) are concerned with a greater number of environmental factors than is Section 404(c) limits the **manner** in which the EPA may determine the effect on the 404(c) resources, including the use of the practicable alternatives test. Both the 404(b)(1) guidelines and the section 403 criteria, upon which they are patterned, provide a means to evaluate the desirability of discharges into the aquatic environment. Applying these

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[19] Section 403(c) states, in part:

(c)(1) The Administrator shall . . . promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans, which shall include:

(A) The effect of disposal of pollutants on human life . . .;
(B) the effect of disposal of pollutants on marine life. . . .;
(C) the effect of disposal of pollutants on aesthetic, recreation and economic values;
(D) the persistence and permanence of the effects of the disposal of pollutants;
(E) the effect of the disposal at varying rates, of particular volumes and concentrations of pollutants;
(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and
(G) the effect on alternate uses of oceans, such as mineral exploitation and scientific study.

33 U.S.C. section 1343(c)(1)(A)-(G).

standards to a proposed discharge in a particular context does no violence to the policy underlying the Act. These guidelines provide a useful tool for evaluating discharges into the aquatic environment. Furthermore, the fact that Section 403(c) explicitly allows an agency to consider a certain factor does not necessarily mean that the absence of such a provision in Section 404(c) precludes consideration of that factor. Instead, use of these criteria makes the general standard workable. Moreover, the EPA did not use the Section 404(b)(1) guidelines to find an unacceptable adverse impact on any resource not specified in Section 404(c). The unacceptability of the site was determined with respect to wildlife, a category explicitly enumerated thereunder.[20]

Alternatively, Pyramid argues that the EPA's interpretation is in contravention to the clear language of the regulations. An unacceptable adverse effect is defined as an "impact on the aquatic or wetland ecosystem which is likely to result in significant loss of or damage to" any of the environmental resources enumerated in Section 404(c). 40 C.F.R. section 231.2(e). Arguably, the only relevant portion of the 404(b)(1) guidelines are those pertaining to the degree or magnitude of an effect[21], and only those findings relevant to determining whether a significant degradation has occurred under Section 404(b) are relevant to the EPA's inquiry under Section 404(c).[22] The

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[20] This aspect of the Final Determination will be discussed at a later point in this opinion.

[21] The term "significant" as used in the 404(b)(1) guidelines means "important, major or consequential." *Sierra Club v. United States Army Corps of Engineers*, 772 F.2d 1043, 1053 (2d Cir.1985).

[22] 40 C.F.R. section 230.10(c) provides, in part:
[N]o discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. Findings of significant degradation related to the proposed discharge shall be based upon the appropriate factual determi-

404(b) regulations state that findings of significant degradation shall be based upon appropriate factual determinations, evaluations and tests required by subparts B and G, after consideration of subparts C-F of 40 C.F.R. section 230. Although Subpart B prohibits discharges when a practicable alternative exists, Pyramid focuses exclusively on that portion of Subpart B which prohibits significant degradation to waters and claims that it alone is relevant to a Section 404(c) analysis.

The court finds, however, that the pertinent regulations, when read as a whole, do not mandate this restrictive interpretation. Indeed, the regulations expressly state that "degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources." 40 C.F.R. section 230.1(d). The 404(b)(1) guidelines address not only the magnitude of the loss but also the avoidability of the loss.

The court finds the EPA's interpretation that the avoidability of a loss may be considered in conjunction with its magnitude in determining whether it is "unacceptable" within the meaning of Section 404(c) and "significant" within the meaning of the implementing regulation is reasonable. This interpretation does not violate the plain language of the statute or the language of the pertinent regulations.

Pyramid also objects to the EPA's "de novo" review of the Corps determination that no practicable alternatives were available. Neither the statute nor the pertinent reg-

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nations, evaluations, and tests required by Subparts B and G, after consideration of Subparts C through F, with special emphasis on the persistence and permanence of the effects outlined in those subparts. Under these Guidelines, effects contributing to significant degradation considered individually or collectively include:

(3) Significant adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat . . .

ulations mandate that the EPA accept all or part of the Corps' findings under Section 404(b) in making its determination under Section 404(c). The plaintiffs contend that this freedom will allow the EPA unbridled authority to second guess every application by the Corps of the 404(b)(1) guidelines[23] and will effectively vitiate the scheme of review envisioned by Congress.

Although the statute itself does not prohibit the Administrator from exercising his independent judgment in applying portions of the 404(b)(1) guidelines in deciding whether an adverse effects are unacceptable under Section 404(c),[24] the court must examine the legislative history. An administrative interpretation which appears reasonable under the language of the statute but is contrary to the intent of Congress cannot be upheld. *See Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 101 S.Ct. 2239, 68 L.Ed.2d 744 (1981) (statutory language controls unless clear legislative intent to contrary).

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[23] Pyramid claims that adoption of the defendants' view will result in gross duplication of administrative effort. The court however, questions the accuracy of this prophecy. The EPA has completed only five Section 404(c) proceedings as compared to the thousands of permit decisions made by the Corps since the enactment of the Federal Water Pollution Control Act in 1972.

[24] Indeed, Judge Green, in *Newport Galleria Group v. Deland*, 618 F.Supp. 1179, 1182 n. 2 and 1184 (D.D.C.1985), noted *albeit* in dicta, that "it would be extraordinary if Congress granted the EPA veto power over the Corps' permit decision, but precluded it from reconsidering those issues the Corps considered in granting the permit in the first place . . . if the section 404(c) veto is to have any meaning at all, the EPA must be able to disagree with the Corps' conclusions." In *Newport Galleria Group*, the plaintiffs herein sought to enjoin the EPA Regional Administrator from commencing Section 404(c) proceedings. They asserted therein that the EPA had no authority to reconsider the practicable alternatives already considered by the Corps. The court dismissed the action on the basis that final reviewable agency action had not occurred.

Legislative History

Pyramid claims that the legislative history demonstrates Congress' intent to vest the Corps with broad authority to consider "reasonable alternatives" as part of the permitting process and to restrict the EPA's reviewing authority to areas of environmental concern. Plaintiffs rely on language contained in the House bill and report in making this assertion.

The House bill gave the Corps responsibility for regulating the discharge of dredged or fill materials but recognized the EPA's expertise in environmental areas. *See* H.R. 11896, 92d Cong., 2d Sess. (1971), *reprinted in* 1 *Legislative History of the Water Pollution Control Act Amendments of 1972* at 1063 (1973). Thus the EPA was given authority, but this authority was restricted to prohibiting the discharge of dredged or fill materials "in critical areas" such as "shellfish beds, breeding or spawning areas, highly susceptible resort beaches, and similar areas." H.R. Rep. No. 911, 92d Cong., 2d Sess. 129 (1972), *reprinted in* 1 *Leg. History* at 816. Moreover, the Corps was not required to follow the EPA's designation of critical areas when the Corps certified that there was no "feasible alternative reasonably available." H.R. 11896, *reprinted in 1 Leg. History* at 816.

The original Senate bill, however, made no distinction between disposal of dredged or fill material and any other pollutant. S. 2770, 92d Cong., 1st Sess. (1971), *reprinted in* 2 *Leg. History* at 1685-92 (1972). Consequently, the Senate, recognizing and deferring to the agency's expertise in environmental areas, proposed that permitting authority lie with the EPA. Senate Debate on S. 2770, 92d Cong., 1st Sess. (1971), *reprinted in Leg. History* at 1387-88. Amendments giving the Corps exclusive authority to regulate the discharge of dredged or fill material were rejected. S.Rep. No. 414, 92d Cong., 1st Sess. 92 (1971),

U.S.Code Cong. & Admin.News 1972, p. 3668, *reprinted in* 2 *Leg. History* at 11059.

The version finally adopted represented a compromise between both houses whereby the Corps retained its traditional permitting authority and the EPA exercised its expertise in evaluating impacts on environmental resources. *See* S.Rep. No. 92-1236, 92 Cong., 2d Sess., *reprinted in* 1 *Legislative History* at 324-35. Senator Muskie described this compromise as follows:

> A major difference between the Senate Bill and the House amendment related to the issue of dredging. The Senate Committee had reported a bill which treated the disposal of dredged spoil like any other pollutant. Pursuant to an amendment accepted on the Senate floor, dredged spoil disposal was made subject to a different set of criteria to determine any environmental effects.
>
> The House bill not only established a different set of criteria to determine the environmental effects of dredged spoil disposal but also designated the Secretary of the Army rather than the Administrator of the Environmental Protection Agency as the permit issuing authority. The Conference agreement follows those aspects of the House bill which related to the Secretary of the Army's regulatory authority. However, consistent with the Senate provision, the Administrator of the [EPA] has three clear responsibilities and duties.
>
> First, the Administrator has both responsibility and authority for failure to obtain a Section 404 permit or comply with the condition thereon. Section 309 authority is available because discharge of the "pollutant" dredge spoil without a permit or in violation of a permit would violate section 301(a).
>
> Second, **the [EPA] must determine whether or a not a site to be used for the disposal of dredge spoil**

> **is acceptable when judged against the criteria established for fresh and ocean waters similar to that which is required under Section 403.**
>
> Third, prior to the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of **will not adversely affect the municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas)**, wildlife or recreational areas in the specified site. Should the Administrator so determine, no permit may issue.

1 *Leg. History* at 177 (emphasis added). Pyramid characterizes the compromise reached as reflecting Congress' desire to give each agency a discrete role.

However, nothing in the legislative history indicates Congress' desire to limit the EPA's role in assessing the environmental acceptability of a site. Indeed, statutory language should be interpreted in a way that harmonizes it with the general purposes manifested by Congress. *See C.I.R. v. Engle*, 464 U.S. 206, 104 S.Ct. 597, 78 L.Ed.2d 420 (1984). None of history cited demonstrates that the Administrator may not consider the practicable alternatives test originally employed by the Corps in determining the environmental impact of a proposed discharge on the five identified resources.

4. Practicable Alternative Finding

Feasibility

In order to be a practicable alternative, the alternative must be feasible. Pyramid argues that the EPA's determination of feasibility was based upon its erroneous conclusion that the marketplace considered the North Attleboro site suitable for a virtually identical regional shopping mall. FD at 16. Pyramid notes that six other shopping center developers over the past fifteen years have

tried and failed to develop the North Attleboro site as a shopping center. B-6 at 4-12. It contends that the EPA impermissibly substituted its own judgment for that of the marketplace in an area in which it cannot claim expertise. *See Friends of the Earth v. Hintz,* 800 F.2d 822, 835 (9th Cir.1986).[25] Pyramid would, therefore, require the EPA to adhere to the details of an applicant's plan.

The EPA, however, contends that it did not simply substitute its judgment for that of the developer. Indeed, "an applicant's submission of information clearly within its expertise is normally accepted by the Agency." FD at 17. Instead, the EPA argues that the evidence on the record demonstrates that the North Attleboro site is suitable in fact for a regional shopping mall virtually identical to that proposed by Pyramid.[26] In this respect, the fact that a competing developer the New England Development Company, Inc. had found the site suitable for a similar shopping mall, *See* B-235; B-173, and its own marketing analysis weighed in reaching this decision. FD at 17; B-863. The EPA also engaged in a review of the specific features that Pyramid found objectionable; namely, the distance from the primary trade area[27], lack of visibility from near-by highways[28], zoning[29], past failures of prior attempts to develop a shopping mall at the site[30], and various practical

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[25] The court held that the Corps' reliance on a 404 applicant's submissions on feasibility was proper and stated that "the Corps is not a business consulting firm, it is in no position to conduct a feasibility study of alternative sites."

[26] FD at 16. B-173, "Feasibility Analysis for State properties of New England"; B-235, "Mall Market Analysis for Corps."

[27] FD at 17-18.

[28] The EPA determined that the site was visible from I-295 and Route 1. FDA at 18.

[29] The EPA determined that the zoning had been changed to accommodate a shopping mall. FD at 18.

[30] The EPA determined that the North Attleboro site was competing

considerations.[31] Consequently, the court finds that the EPA's feasibility determination was not arbitrary.

Availability

The EPA contends that its interpretation of "availability" was reasonable and its finding that at least one practicable alternative existed was not arbitrary and capricious. An alternative is practicable if it "**is available**" and "**capable of being done after taking into consideration cost, existing technology and logistics in light of overall plan purposes.**" 40 C.F.R. 230.-10(a). For the purposes of this section, "**an area not presently owned by the applicant which could be reasonable obtained . . . may be considered.**" *Id.* The plaintiffs argue that "available" means "presently available." Under this interpretation, the permitting authority would be required to limit its consideration of the alternative sites to those sites which are available to the applicant *at the time the agency makes its decision on the permit application.* Thus, Pyramid claims that the EPA engaged in impermissible "back-dating" when it decided that the availability determination should be made at the time the applicant "entered the market", FD at 21 n. 14, "began its investigation," *Id.* at 22 or "comprehensively evaluated the area." *Id.* at 22 n. 15. Pyramid argues that this interpretation gives the EPA unlimited power to block proposals merely because some alternative was available in the past.

The EPA counters this argument by noting that Pyramid's interpretation of the regulations undercuts the purpose underlying the practicable alternatives test and that

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for some the same tenants that Pyramid had considered. Furthermore, the New England Development Company had not encountered any major obstacles in its efforts to develop the North attleboro site. FD at 19; *see* H-81.

[31] The EPA determined that these same practical considerations afflicted the Sweden's Swamp site. FD at 19.

it is reasonable and consistent to expect applicants planning non-water dependent projects to demonstrate that construction on uplands was considered before the use of wetlands was contemplated. Plaintiffs, however, argue that the regulations do not impose any pre-application obligation on the applicant to investigate the use of uplands, rather, they maintain that the burden is on the Corps to determine whether an alternative "is available."

Pyramid also bases its conclusion on the language of the regulation itself which states that "an alternative is practicable if it is available." The EPA contends that the term "is available" can refer to any time period in which the guidelines are applied. The Final Determination focused on the point in time when the applicant actually examined the alternatives. This interpretation guards against manipulation by developers.

Nevertheless, Pyramid argues that the EPA's interpretation of availability is entitled to no deference whatsoever because determinations of feasibility and availability are not matters within the agency's expertise. *See Bethlehem Steel Corp. v. EPA*, 723 F.2d 1303 (7th Cir.1983). Pyramid would have the court adopt the Corps' interpretation of the term "available." Although the Corps did not specifically address this issue, it did determine that:

> [F]rom the point of view of the applicant in this case, it appears that the North Attleboro site is not available. The north site is controlled by a competitor who has an interest in developing a regional shopping mall in the same trade area as the applicant.

B-14 at 1; SOF/EA, Views of the Chief of the Engineers at 1.

Moreover, the Corps' Statement of Findings and Environmental Assessment states:

> Is there an alternative . . . not presently owned by the applicant, that can be reasonably obtained? *There*

> *is an alternative site available . . . It is not available to these applicants, because it has been optioned by another mall developer.*

Id. at 16.

Thus, it appears that the Corps assumed that the alternatives were to be considered contemporaneously with the application.

Nevertheless, the court finds that the EPA's interpretation of the regulations was reasonable.

Assuming that the government's "market entry" approach to availability is reasonable, Pyramid claims that the record does not support the agency's finding of availability.

Support in Record

The record shows that the New England Development Company optioned the North Attleboro site on July 1, 1983. *See* FD at 22.[32] Pyramid did not purchase Sweden's Swamp until December 1983 and was not in the area until September of 1983. *See* Plaintiff's Reply Brief at 22. Thus, Pyramid concludes that the EPA could not reasonably infer from the record that it had "entered the market" prior to New England's gaining control of the property.

The EPA, however, asserts that its decision was based on evidence in the record. Although the largest parcel was under its control in July 1983, the site option acquisition was not completed until February 1984, after Pyramid acquired Sweden's Swamp in December 1983. *Id.* Pyramid has stated that it had the opportunity to purchase the North Attleboro property but declined to do so, B-888 (statement by Bersani in newspaper); B-107 (minutes of 4/3/85 meeting with Pyramid). Statements to this effect were

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[32] *See* B-109 (EPA memo); B-474; B-863; B-226; B-455A; H-76.

contradicted, however, at a later time. B-42 at 9 (Bersani Affidavit) (site not available); B-504 at 4 (site not available after fall of 1983). In its supplement to its Section 404 application, dated October 1984, Pyramid states that "our ultimate [reason] for rejecting the North Attleboro I site was its location and therefore its market nonfeasibility." B-6 at 20. The supplemental application does not indicate whether the New England Development Co. would have sold the land to Pyramid in September of 1983, but Pyramid does state in that document, however, that "our competitor, State Properties of New England [New England Development Co], has spent little, if any, money on their attempt to develop this site. The current landowner, Allen Riley, is the primary financier of this effort. Mr. Riley is driven by a need and desire to rid himself of a vacant parcel with which he has been burdened for over five years." B-6 at 21.

Finally, the EPA simply did not believe Pyramid's assertion that it purchased the site in December 1983 after only eight weeks of investigation. FD at 22; *see* B-42 at 10. The EPA reached the conclusion that it would be customary to investigate a trade area for longer than eight weeks. FD at 22, n. 15. For example, Pyramid's predecessor, the Edward DeBartolo Corporation withdrew its plans to develop the area in March 1983. DeBartolo then contacted Pyramid. B-131. Pyramid, however, is correct in its assertion that the EPA has failed to cite any direct evidence pertaining to its conclusion that industry custom would support a finding that more than eight weeks are necessary to properly evaluate an area.

Nevertheless, the court finds that the record supports the EPA's finding that the North Attleboro site was available to Pyramid at the time it "entered the market" in September or December of 1983. This conclusion was not arbitrary.

Even assuming that the EPA reached an arbitrary decision regarding the availability of a practicable alternative, its Final Determination must be upheld as reasonable because it was based upon a rational, independent finding that a significant loss in wildlife resources would result from the construction of a mall at Sweden's Swamp.

5. Adverse Effects

Pyramid contends that the EPA failed to find that unacceptable adverse effects would flow from construction of the proposed mall, but instead based its conclusion solely on the fact that a practicable alternative existed. It claims that any findings of adverse effects are inextricably intertwined with the EPA's finding that these effects were avoidable. Pyramid concedes that proposed mitigation is relevant to determining the *net* environmental effect. *See* Plaintiffs' Reply Brief at 34 n. 29.

The Final Determination issued by the EPA clearly identifies the adverse effects of the project on the site's wildlife resources.[33] The decision makes the following findings.

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[33] The intervenor-plaintiffs Citizens in Support of Attleboro Mall and Joseph Robichaud (CISA) contend that the EPA committed error by considering the effects of the proposed discharge on the "wildlife habitat" rather than on the "wildlife" because Section 404(c) refers to "wildlife." They also argue that a finding of adverse effects on wildlife or wildlife habitat must involve a specific adverse effect on water quality.

Assuming the legal correctness of the intervenor-plaintiffs' position, the administrative record does indicate that destruction of the existing wildlife habitat at Sweden's Swamp will adversely effect wildlife by driving away or killing animals currently living there; by reducing the buffer zone protecting wildlife from human-induced disturbances and by affecting the types of species which would use the area, particularly predatory birds. FD at 10-12; RD at 19-22; SOF/EA at 11-12.

Furthermore, Section 404 addresses broader concerns than traditional notions of water quality. Section 404(c) itself refers to wildlife and recreation, thus, reflecting a broad congressional concern. There

Sweden's Swamp provides an "excellent" habitat for migratory bird species and a variety of mammals and amphibians. FD at 7. Construction of mall at the swamp would eliminate or alter a substantial part of this habitat and result in a significant loss of existing wildlife habitat. FD at 7-9. Nesting species would be adversely affected and many mammals would retreat from or be killed during the construction. FD at 9-10. Many of the displaced species would perish. "The displacement would particularly adversely affect nesting species, such as the northern flicker, gray catbird, song sparrow and white-breasted nuthatch, and species which prefer forested wetlands, such as the red-shouldered hawk and the Kentucky warbler." FD at 10.

Moreover, the Final Determination dwelt extensively on the uncertainty surrounding the potential success of Pyramid's mitigation proposals. The Administrator determined that the proposed onsite mitigation, which contemplated the creation of emergent marsh, shrub swamp and open water from existing wooded wetlands, would have minimal value after the excavation and regrading. Furthermore, the degree of resettlement would be affected by the activity at the mall and these new wetlands would not buffer the wildlife from the disturbance of nearby highways as effectively as the existing wooded wetlands. The new wetlands would be substantially smaller and of a different type than those lost. FD at 10. The potential success of the offsite mitigation attempt was deemed uncertain. In this respect, Pyramid proposed that it create 36 acres of emergent wetlands, shrub swamp and open water at a location two miles from Sweden's Swamp. Even if successful, the net increase in habitat values at the offsite location would not compensate for those lost at the proposed shopping

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is absolutely no language in the statute or the implementing regulations which supports intervenor-plaintiffs' interpretation that a nexus between an effect on water quality and the adverse effects on wildlife or the wildlife habitat be demonstrated.

mall site. Additionally, the proposed offsite and onsite wetlands would, if successful, provide habitat for a different species mix than that currently populating Sweden's Swamp.

Although the EPA went on to state that "in determining whether these adverse impacts are unacceptable, it is relevant to examine next the avoidability of this wetland loss by reviewing whether there are practicable, less environmentally damaging alternatives to the proposed project," it clearly did consider whether the proposed project would result in "**significant loss of or damage to . . . wildlife habitat.**" 40 C.F.R. 231.2(e). The regulations define an impact having this type of adverse effect as "unacceptable." Applying the definition urged by Pyramid, an effect is significant if it is "important, major or consequential." The Final Determination suggests that these losses are "substantial." At one point, the filling of the swamp is characterized as a "significant avoidable loss of wildlife habitat." Although the decision bases its finding of unacceptability, in part, on avoidability, it also considers the cumulative impact of similar losses and the nature of the loss in this particular context in reaching its decision. Thus, the EPA finally concluded that "the excellent value of the wildlife value of the wetland in question, its size and setting, the avoidability of the loss and the significance of such areas in Massachusetts" made the effects of the project "unacceptable." FD at 30.

Even assuming that the EPA arbitrarily considered and determined the practicable alternatives question, which it did not, the court finds that another independent and rational basis for its decision existed.

CONCLUSION

For the reasons cited above, the court hereby grants the defendants' motion for summary judgment and denies the plaintiffs' motion for summary judgment.

IT IS SO ORDERED.

APPENDIX C

FINAL DETERMINATION OF THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS CONCERNING THE SWEEDENS SWAMP SITE IN ATTLEBORO, MASSACHUSETTS PURSUANT TO SECTION 404(c) OF THE CLEAN WATER ACT

I. INTRODUCTION

Section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) regulates the discharge of dredged or fill material to waters of the United States. Waters of the United States are defined to the broadest extent possible under the Commerce Clause of the Constitution, and include most wetlands. Such discharges are allowed only to the extent authorized by a section 404 permit and not prohibited or restricted by EPA pursuant to section 404(c). Congress established this regulatory scheme in recognition of scientific evidence which indicates that discharges of dredged and fill material can result in the destruction or degradation of aquatic areas with important public values. Wetlands play an essential role in the hydrologic cycle, purify water by holding nutrients and recycling pollutants, shield upland areas from storm damage, and provide vital food resources and habitat for fish and wildlife.

The 404 permit program recognizes both developmental and environmental values by focusing on protecting the resource (that is, the biological, physical, and chemical integrity of the Nation's waters) rather than on regulating development per se. The public has a legitimate expectation in the reasonable protection of private property rights, including the right to make reasonable, beneficial use of one's property. Citizens also expect, however, that the protection of property rights will be consistent with the

need to protect resources that are beneficial to all. This nation would be ill-served by a policy which does not take account of the legitimacy of interests in both environmental protection and economic development. The statutory structure created by Congress in section 404 attempts to accommodate both sets of interests.

The section 404 permit program seeks to minimize adverse effects of discharges of dredged or fill material through application of the section 404(b)(1) Guidelines (regulations developed by the Environmental Protection Agency in conjunction with the Army Corps of Engineers). The Guidelines prohibit discharges which cause "significant degradation" to the aquatic ecosystem or for which there are practicable, less damaging alternatives, and require adoption of practicable measures to minimize adverse effects of the discharges that are allowed. Although permits are issued by the Army (acting through the Corps of engineers) or by approved states, the Act also provides EPA an opportunity under section 404(c) to exercise the final judgment on whether a particular discharge will have unacceptable adverse affects on aquatic resources. Before making such a section 404(c) determination, the Administrator must consult with the Chief of Engineers, the landowner, and the applicant in cases where there has been an application for a section 404 permit.

The Administrator has delegated this authority to make a final determination under section 404(c) to the Assistant Administrator for External Affairs, who is EPA's national section 404 program manager.

In this case, Pyramid Companies (Pyramid) has proposed to fill 32 acres of forested wetlands and to alter an additional 13 acres of forested wetlands at a site called Sweedens Swamp in Massachusetts. The purpose of this proposed discharge of dredged and fill material is to construct a shopping mall and appurtenant facilities. Pyramid has also offered to create 36 acres of artificial marsh wet-

lands to compensate for the loss of Sweedens Swamp, and has offered to post a $1 million performance bond on the man-made wetland's construction.

The Corps of Engineers gave great weight to Pyramid's offer and concluded that the project should be allowed to proceed, notwithstanding questions concerning the availability of upland alternatives. The Corps concluded that Pyramid's proposed wetland creation (or "mitigation") would yield an equivalent or better environmental result than preserving the existing wetland. Because of the site specific and generic implications of wetland creation and its relationship to EPA's and Corps' longstanding policy of avoiding the destruction of existing wetlands when the applicant has other practical alternatives available, EPA initiated this section 404(c) proceeding.

After full consideration of the record in this case and after consultation with the Corps, Pyramid and other interested parties, I have determined that the discharge of dredged and fill material for the purpose of constructing a shopping mall at the Sweedens Swamp site should not be allowed. My findings and reasons for this determination are, in summary form, as follows:

Although mitigation is a valuable and important tool in wetland preservation and enhancement, it is still an uncertain science at best. EPA encourages mitigation efforts when there are no practical alternatives other than filling in a wetland for a particular project and the project does not cause significant degradation to aquatic resources. EPA is also attempting to improve the science of artificial wetland creation. Nonetheless, the science of wetland creation, particularly for a project of the size and type proposed here, is not sufficiently advanced to land the requisite certainty to a determination that existing benefits can be sacrificed on the promise that a new and different wetland will be "better" or even "equal" in value.

In reaching my decision, I have carefully considered the nature of the wetland at issue here. The comments in the record range from characterizing Sweedens Swamp as a "dump" to calling it a wetland "oasis." The truth is the Swamp is neither dysfunctional and useless, nor is it a pristine wetland of supreme individual value. It is, in the non-perjorative sense, an ordinary swamp. The fact that it is ordinary should not lead us to alter our policy policy of looking first to see whether there are practical alternatives to the destruction of the wetlands. I believe that, because of its confidence in the mitigation proposal, the Corps did not engage in its usual careful consideration of alternatives.

I find that there was a feasible alternative site available to Pyramid to fulfill its project objectives. And it is unacceptable to trade the certain benefits provided by this functioning wetland for the uncertain benefits of a large scale wetland creation. The language, regulations and purpose of section 404 all point to a fundamental principle: The degradation or destruction of special aquatic sites, such as wetlands, should be avoided if there are practical alternatives. This is neither a new nor a startling principle; it reflects a common sense approach to the preservation of a dwindling and important national resource.

What is unusual in this case is the factual setting in which the application of the principle arises. Pyramid now cannot realistically obtain the alternative site that I find was available to it. The site (North Attleborough) is owned by a competitor. Pyramid argues that the present unavailability of the site is dispositive and that it should be allowed to proceed with its project. I do not believe that fact can be given determinative weight.

When Pyramid entered the market area, it decided not to investigate the availability of the North Attleborough site, concluding that the site was not feasible for its project. That may well have been a reasonable business judg-

ment for Pyramid to make. But in relying upon that judgment and in failing to pursue the alternative, Pyramid took the concomitant risk that the marketplace would prove it wrong in its assessment of the feasibility of the site. That is what happened in this case. A competitor, entering the market contemporaneously with Pyramid, has taken the requisite steps to develop a similar project on the North Attleborough site. I cannot ignore that fact, nor can I, consistent with the purposes of section 404, lift from Pyramid the risk that it assumed in relying upon its business judgment that the North Attleborough site was infeasible. Pyramid's mitigation plan simply does not justify a deviation from the principle that wetlands should not be destroyed if practical alternatives are available.

In reaching my decision, I have also viewed this project in the context of broader regional issues. There has been a significant cumulative loss of wetlands in Massachusetts, and the state has put into effect stringent new limitations on wetlands destruction, effectively prohibiting any fill of more than 5,000 square feet of bordering inland wetlands. While this should not be viewed as a dominant factor—particularly since Massachusetts, by grandfathering the Pyramid project, has given the project the necessary state permits—it does reflect a qualitative assessment of the importance of the remaining wetlands in the state, and is a useful guidepost in judging the unacceptability of this fill.

Finally, on a more general note, I believe that both environmental and developmental interests are best served by a section 404 process that works efficiently and predictably. Great improvements in this regard have been made in the permit process. This particular section 404(c) proceeding has attracted a great deal of controversy and attention and has taken time to resolve. I do not view that, however, in any way as a flaw in the process. Pyramid made a novel offer of large scale offsite wetland creation in an effort to secure a permit for a site that it

bought with full knowledge of the environmental problems associated with its development. That offer raised admittedly difficult issues where assessments of risks and benefits may legitimately differ. As indicated by the decision here, EPA will tend to be more conservative in its assessment of scientific uncertainties. In leaving the final determination of "unacceptability" to EPA, however, Congress, contemplated that EPA would apply its expertise on issues such as mitigation and would take a conservative approach to our nation's unique aquatic sites. I have carefully weighed all aspects of the proposed permit and considered both its site specific and precedential implications. I am convinced that approval of the project, given the existing uncertainties and alternatives, would have unacceptable adverse environmental consequences.

II. PROJECT DESCRIPTION AND HISTORY

Pyramid proposes to fill 32 acres of wetlands in Sweedens Swamp in Attleboro, Massachusetts to build a regional shopping mall. (See Figures I-II.) If permitted, this would be the largest authorized wetlands fill project in Massachusetts in over five years. Pyramid proposes to mitigate the adverse impacts on water quality and wetlands by excavating thirteen additional acres of wetlands and nine acres of uplands onsite to create artificial wetlands. The alteration of the thirteen additional acres of natural wetlands is required to provide onsite capability for the storage and treatment of stormwater runoff from the development. Creation of thirty six additional acres of wetlands offsite would also be attempted.

Pyramid first formally presented its proposal, which at the time included only onsite mitigation, to the federal agencies in May of 1984. EPA and the U.S. Fish and Wildlife Service (FWS) expressed concern over the loss of

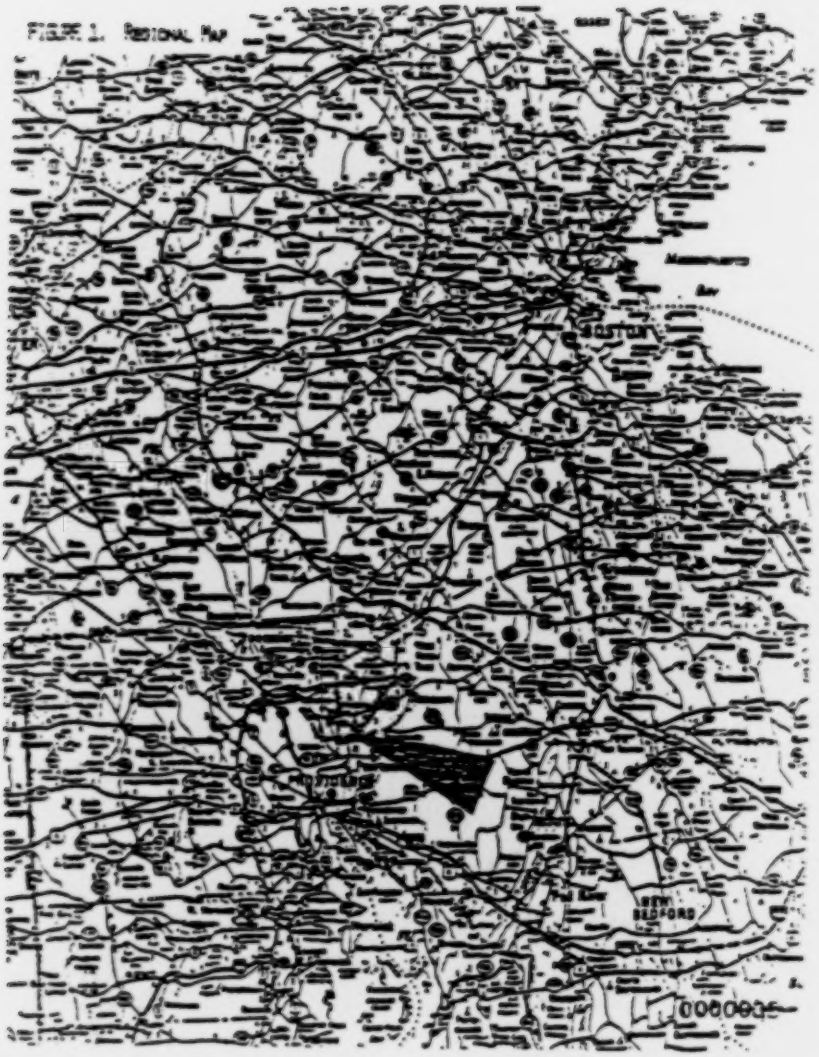
FIGURE 1. REGIONAL MAP
BOSTON
NEW BEDFORD

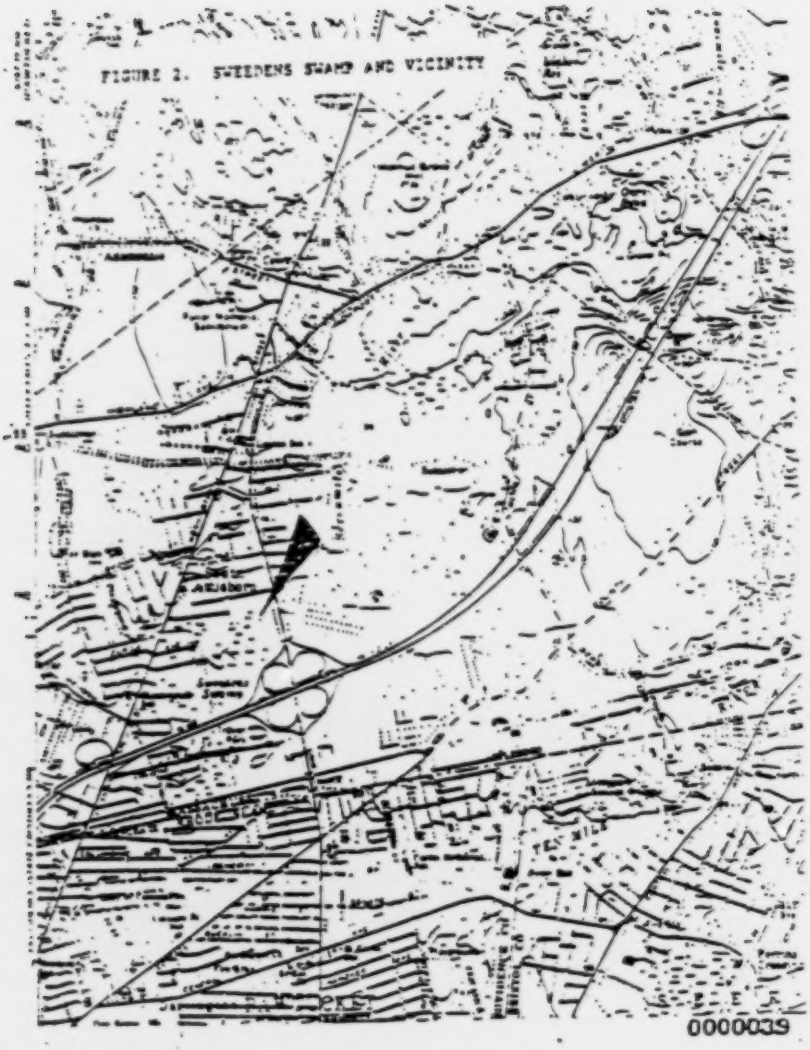
FIGURE 2. SWEDENS SWAMP AND VICINITY
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wetlands[1] and requested that the Corps of Engineers (Corps) exercise its discretion to require an individual permit. The Corps agreed and so notified Pyramid; the permit application was submitted in August of 1984. After participating with Pyramid, the Corps and FWS in an evaluation of the wildlife habitat value of the site, EPA wrote letters to the Corps again expressing concern over the impacts of the proposal, emphasizing the presumption in the section 404(b)(1) Guidelines that practicable alternatives are presumed to exist for non-water dependent activities (such as shopping malls) in special aquatic sites (e.g., wetlands). The Corps hired a consultant to examine the question of practicable alternatives; his January, 1985 report concluded that both Sweedens Swamp and a site in North Attleborough were feasible for development of regional shopping malls. New England Development, a competing developer, proposes to build a shopping mall at the North Attleborough site.

In April of 1985 Pyramid added a proposal for offsite mitigation to the project. The Corp's Division Engineer in May of 1985 prepared a recommendation that the permit be denied, concluding that Sweedens Swamp provides excellent wildlife habitat for species of local importance. Corps Headquarters in Washington, D.C., after reviewing the Divison's recommendation, determined that mitigation could make the applicant's proposal the alternative with the least adverse effect on the aquatic environment and directed the Division Engineer to prepare a notice of intent to issue a permit.

The Corps Division prepared a proposed permit, but predicated permit issuance on the expected success of on-

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[1] EPA's section 404(b)(1) Guidelines, which provide substantive environmental criteria used in section 404 permitting decisions, classify wetlands as "special aquatic sites," and characterize their degradation or destruction as "among the most severe environmental impacts covered by these Guidelines."

site and offsite mitigation and on steps to improve water quality. The proposed permit continued to characterize Sweedens Swamp as an excellent wildlife habitat.

EPA's Regional Administrator (Region I) Michael R. Deland, initiated section 404(c) action on July 23, 1985 by providing to the Corps and the applicant the opportunity for consultation on the discharge. FWS' Regional Director, by letter of July 25, 1985, indicated his support for EPA's action because the project would result in "significant avoidable adverse impacts to wildlife and to the wetland habitat upon which that wildlife depends." The Region entered into discussions with Pyramid and conducted a public hearing at which both supporters and opponents of Pyramid's mall spoke (the majority attending favored the mall). Over 1200 comments were received during the public comment period. After considering this information, and comments received by the Corps on Pyramid's offsite mitigation plan, the Regional Administrator on March 4, 1986 made a recommended determination to prohibit the specification of Sweedens Swamp as a disposal site for fill material.

The Recommended Determination (RD) was received in EPA Headquarters on March 5, 1986, and the administrative record was received on March 14, 1986. Meetings were held by the Assistant Administrator of External Affairs and by staff in EPA Headquarters with representatives of Pyramid on March 21 and 25, 1986, and with Department of Army/Corps of Engineers on March 27 and April 3, 1986. Meetings were also held with environmental and community interest groups on March 21, with representatives of New England Development on March 26, and with State and local representatives on April 4, 1986. In addition, several meetings were held with members of the U.S. Congress during the Headquarters' review of this case. Thousands of letters were received supporting the building of the mall; hundreds were received supporting a prohibition of the discharge.

The Assistant Administrator for External Affairs visited Sweedens Swamp, the North Attleborough Mall site, and the proposed Tiffany Street offsite mitigation area with EPA Region I staff on November 20, 1985.

Appendix A contains a month-by-month chronology of this case.

III. DESCRIPTION OF SITE

The detailed description of the 82-acre site and its present values which appears at Section III of the recommended determination is hereby incorporated by reference. The key points are summarized below.

The 49.5 acres of wetlands on the proposed project site are classified as palustrine forested, hardwood deciduous, seasonally flooded. They are characterized by a forest canopy consisting predominately of red maple trees over shrub and herbaceous layers. There are smaller areas of emergent wetland, shrub swamp, streams, and standing water in part of the wetland, which provide more diversity to the habitat.

The forested wetlands of the site have excellent vertical structure and provide habitat for several migratory bird species and a variety of resident mammals and amphibians. The wetlands also provide valuable summer habitat for many birds from surrounding areas which seek the abundant food sources (fruits and insects) as well as the shade and drinking water found there. Birds observed using the site include mallard and black ducks, the red-shouldered hawk and the red-tailed hawk (avian predators that feed on small mammals that inhabit wooded swamps), the swamp sparrow, the Kentucky warbler and the common yellowthroat. A full list of all the species observed using the site is included in the recommended determination.

Extensive adjacent development has made Sweedens Swamp an isolated or "island" wildlife habitat. While this

may restrict the number of species using the site, its size is sufficient to maintain a diverse resident wildlife population. Island ecosystems in highly developed areas are important because they provide the last remaining habitat for species that have been extensively disturbed.

The Corps and the FWS characterize the site's wildlife habitat as excellent. FWS designates the site as Resource Category 2, the second highest in its system for classifying habitat. The Massachusetts Division of Fisheries and Wildlife identifies the area as a "high-quality red maple swamp." EPA concurs that Sweedens Swamp provides excellent wildlife habitat.

A number of commenters have characterized Sweeden Swamp as a "dump." Trash and debris are present at the site, primarily along the highly visible perimeter and on the disturbed upland portions of the site. However, only a few scattered piles of debris litter the interior of the wetland; EPA estimates that dumping directly affects less than one tenth of the entire 82-acre site, little of that wetlands. Although unsightly to the casual observer, the refuse has little direct bearing on the wetland values provided by Sweedens Swamp. Parts of Sweedens Swamp have also been subject to other forms of human disturbance, for example, paving and motor bikes. While this may have some impact on species using the site, the Corps found that "large segments of wetland remain relatively isolated from human impact." EPA agrees that the habitat values have not been significantly altered by this disturbance.

Pyramid and others have described the site as a wetland "in name only" and contended that it "does not function as a true wetland." These assertions are incorrect. Based on the information in the record concerning soil characteristics, vegetation and hydrologic regime, Sweedens Swamp is a typical New England red maple swamp which provides excellent wildlife habitat. EPA does not concur

that Sweedens Swamp is a dysfunctional or low quality wetland.

Sweedens Swamp is also an effective area for storing flood water and moderating peak flows. Since the area draining into the wetlands is relatively small, these hydrologic values are important primarily when considered cumulatively. In terms of groundwater, this site acts mainly as a discharge area rather than a recharge area.

Because at least 30% of the total annual flow entering the site has the opportunity to contact vegetation, Sweedens Swamp has the capability to remove waterborne pollutants and to improve water quality.

In summary, Sweedens Swamp provides many wetland values such as wildlife habitat, food chain production, natural flood storage, groundwater discharge, and water quality renovation. While it is neither a unique wetland nor habitat for endangered species, this does not mean that Sweedens Swamp is unworthy of protection under the Clean Water Act. Average healthy functioning wetlands, such as Sweedens Swamp, comprise the bulk of our nation's wetland wildlife habitat.

IV. ADVERSE EFFECTS OF THE PROJECT

Construction of a large shopping center at Sweedens Swamp would drastically change the hydrology, soils, and biology of the area.

The location of the mall building, parking lot, and access roads are shown on Figure III. The western wetland basin would be completely filled. The mall itself would result in the filling of 32 acres of forested wetlands. Thirteen additional acres of forested wetlands would be excavated or otherwise altered to create marsh as part of the proposed onsite (i.e. work adjacent to the mall) mitigation.

The proposed onsite mitigation, if successful, would result in the conversion of 13 acres of forested wetlands

and nine acres of uplands to 22 acres of emergent wetlands, shrub swamp and open water. Four acres of the existing forested wetlands would be preserved within the proposed onsite mitigation area. Thus, of the existing 49.5 acres of forested wetlands, only four and a half acres would remain after the construction of the shopping mall as well as the onsite mitigation. (The onsite mitigation was designed, at least in part, to provide necessary restoration of flood storage capacity and to handle new water pollution from the proposed mall.)

A. Wildlife Effects

As discussed in Section III, Sweedens Swamp provides a large, diverse habitat for a variety of wildlife, particularly species of birds, small mammals, and amphibians, that are typical of New England forested swamps. A substantial part of this habitat would be eliminated or altered. The numerical habitat assessment model (Appendix B) confirms that the proposed project would adversely affect wildlife values, through the loss of both wetland and upland habitat. There would be an outright loss of 45 acres of forested wetland, and a significant loss of the existing value of wildlife habitat as illustrated by the model. The proposed shopping mall would affect wildlife that currently utilizes Sweeden Swamp and would also alter available wildlife habitat.

Construction activities within the proposed mall site would convert 32 acres of forested wetlands to uplands which, for the most part, will be non-vegetated impervious surfaces. The observed mammal species would retreat from construction activities. However, as previously discussed, Sweedens Swamp is an island habitat and is not connected to adjacent habitats. When construction on the mall site begins, mammals will be dispersed into remaining portions of Sweedens Swamp (depending, of course, upon how much of the onsite mitigation is completed before construction) and away from Sweedens Swamp. Since the areas in the

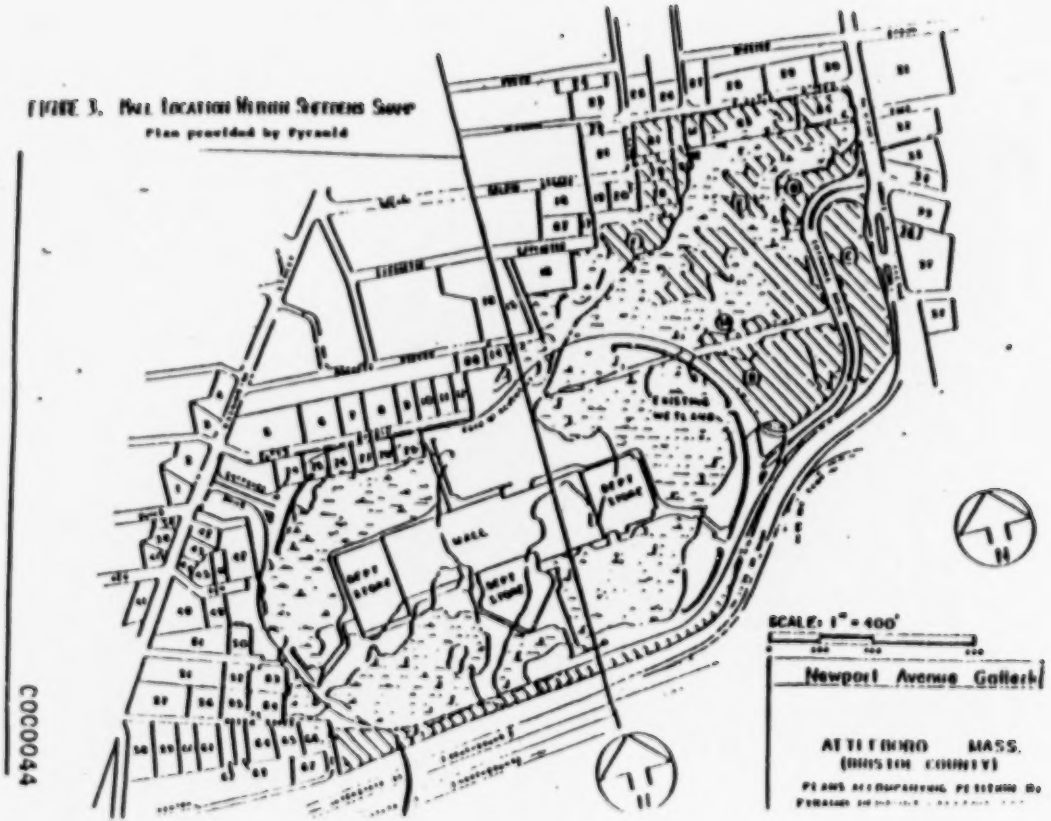
FIGURE 3. Mall Location Within Southern Sewer
Plan provided by Pyramid
SCALE: 1" = 400'
Newport Avenue Gallery
ATTLEBORO MASS.
(BRISTOL COUNTY)

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vicinity that might provide habitat for mammals displaced from Sweedens Swamp are not connected, it may be assumed that some of the mammals displaced from Sweedens Swamp would perish. Construction activities would also displace the bird species observed in Sweedens Swamp.

The displacement would particularly adversely affect nesting species, such as the northern flicker, gray catbird, song sparrow and white-breasted nuthatch, and species which prefer forested wetlands, such as the red-shouldered hawk and the Kentucky warbler. The remainder of the observed bird species are generalists and less specific in their habitat requirement. Therefore, it is assumed that, once displaced, these species will have a better chance of finding replacement habitat.

In addition to affecting wildlife that currently utilizes Sweedens Swamp, the project will also alter available wildlife habitat. From a broad perspective, the loss of forested wetland habitat would be permanent (with or without the proposed mitigation). From the mid-1950's to the mid-1970's the U.S. lost over six million acres of forested wetlands. Many Massachusetts Conservation Commissions, appointed bodies responsible for carrying out Massachusetts' wetlands law at the local level, have expressed grave concern over the potential loss of this amount of wooded swamp, as well as its precedential effect.

Pyramid proposes to attempt to compensate for adverse wildlife impacts at the site by altering existing wetland habitat and by creating wetlands from upland areas. This attempt at compensation involves both "onsite mitigation" (i.e., work adjacent to the mall itself) and "offsite mitigation" (i.e., work at a sand and gravel mining site on Tiffany Street approximately 2 miles from the proposed mall site).

Turning first to onsite mitigation, Pyramid's proposal consists of attempting to create emergent marsh, shrub swamp and open water from existing wooded wetland and

upland. Because only four acres of the wetland would be left in its natural state, the initial dredging and filling of the site would destroy nearly all its existing value for wildlife. The onsite mitigation area would also have minimal value immediately after excavation and regrading. If wetland vegetation in the mitigation area were successfully established, wildlife would probably begin to resettle in the area; however, the degree of resettlement may be affected due to greater disturbance from the activity at the mall. The low profile emergent wetlands proposed for this area would not buffer wildlife from disturbance of the highways (much less from the mall itself) as effectively as the existing wooded habitat does. Even if successfully established, the onsite wetlands would be substantially smaller and of a different type than those lost. The vegetation in these wetlands, although potentially producing more pounds per acre per year, would exhibit less spatial heterogeneity, structural diversity, and standing biomass than the existing swamp. Further, these new wetlands would not provide habitat for the same numbers and types of species displaced or eliminated. The habitat assessment also shows that there would be a substantial drop in both wetland acres (-23) and wildlife habitat values.[2]

In an attempt to offset the net loss of habitat value at Sweedens Swamp, Pyramid proposed additional offsite mitigation. This additional mitigation would occur at a location two miles away where Pyramid would attempt to create 36-acres of emergent wetlands, shrub swamp and open water from an existing 30 acres of upland and 6 acres of open water. The habitat assessment model indicates that, even if 100% successful, the net increase in habitat values at this offsite location would not compensate for those lost

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[2] This net loss is demonstrated numerically in Appendix B. However, as the Appendix explains, the results of the numerical habitat assessment must in any case be viewed with caution because several factors may affect the precision and accuracy of the results.

at the proposed shopping mall site. Although Pyramid plans to provide a net increase of six acres of wetland under its mitigation proposal, any increase in wetland acreage (or numerical habitat values) will come at the expense of existing wetland and upland areas and their respective numerical habitat values. Pyramid has stated that, unless required by EPA pursuant to its section 404(c) authority, it would not have the offsite mitigation in place and functioning prior to beginning work at Sweedens Swamp.

As previously mentioned, the proposed onsite and offsite wetlands, if successful, would provide habitat for a different species mix than that currently utilizing Sweedens Swamp. These include waterfowl, shorebirds as well as a potentially different species mix of mammals, reptiles and amphibians. However, many of the small mammals and bird species typical of Sweedens Swamp would not usually use the new wetlands. While some species of wildlife might migrate to the created wetlands, their numbers and variety would not be the same as exist at Sweedens Swamp. A recent study[3] in Massachusetts suggests that breeding bird communities in forested wetlands are significantly related to vegetation structure and hydrology. The study found that, generally, the most structurally diverse and most poorly drained forested wetland sites (such as Sweedens Swamp) have the most abundant and diverse breeding bird populations. In addition, raptors (predatory birds) such as the red-shouldered hawks observed at Sweedens Swamp would be especially affected. Recent research by the USFWS[4] in Connecticut indicates that these predatory birds are consistently associated with mature, bottomland forests and may be particularly sensitive to land pattern changes in their habitats.

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[3] Swift, B.L., J.S. Larson and R.M. DeGraff. 1984. Relationship of Breeding Bird Density and Diversity to Habitat variables in Forested Wetlands. The Wilson Bulletin, Vol. 96(1): 48-59.

[4] USFWS Research Information Bulletin No. 85-19, November 1985.

B. Hydrological Effects

Based on the record, the impacts to surface water quality from the proposed project appear to be minimal in comparison to other sources of contamination that already exist in the Ten Mile River watershed, although the amount of pollution from the mall site will increase the overall pollutant load to the watershed. The amount of surface water degradation resulting from mall construction and use will not itself be very significant if effective erosion and turbidity control structures are installed during construction and surface water runoff quality is maintained at acceptable levels. In view of the small watershed and associated flows and Pyramid's specific on-site plans, no significant adverse effects on downstream flooding are anticipated as a result of the completed project. It also appears that there would not be adverse impacts from Pyramid's proposed project upon public drinking water supplies, including the Seekonk Water District wells, if effective erosion and turbidity control structures are installed and maintained during construction and surface water runoff quality is maintained at acceptable levels, in accordance with the proposed permit conditions.

Summary

Pyramid's proposal would have an immediate and adverse impact on wildlife habitat. Thirty two acres of wetland with high habitat value would be filled. Moreover, the value of these wetlands to store flood waters, discharge groundwater, and maintain water quality would be lost. In order to provide compensatory flood storage and attempt to replace other wetland values, Pyramid would dredge or fill all but four acres of the remaining forested wetlands and upland. Even assuming full success of the onsite mitigation proposals, there would be a net loss of nearly 24 acres of wetlands and a concomitant decrease in the wildlife value of the site. In an attempt to provide additional compensation, Pyramid proposes to construct 36

acres of artificial wetlands at an offsite location. These wetlands, even if successful, would not serve the same species mix destroyed and therefore would not fully replace the lost habitat values at Sweedens Swamp as calculated by the habitat evaluation method (Appendix B). Thus, the offsite mitigation does not substitute for, but rather seeks to compensate for, the loss of wetlands at Sweedens Swamp.

However, given the circumstances surrounding the Sweedens Swamp site, it does not appear, based upon available information, that the proposed Attleboro Mall project with successful onsite mitigation would materially adversely affect downstream water quality, flooding or drinking water supplies.

In short, the proposed mall project, even with successful onsite mitigation, would have adverse impacts on wildlife values protected by section 404(c) of the Act. In determining whether these adverse impacts are unacceptable, it is relevant to examine next the avoidability of this wetland loss by reviewing whether there are practicable, less environmentally damaging alternatives to the proposed project.

V. ALTERNATIVES TO THE PROPOSED PROJECT

A. Why alternatives are relevant

In determining whether a proposed project would be likely to have an "unacceptable adverse effect" on the aquatic environment, EPA must evaluate both the loss of the resource and the unacceptability of that loss. The section 404(c) regulations state that relevant portions of the section 404(b)(1) Guidelines (40 CFR Part 230) should be

considered in judging the unacceptability of a discharge under section 404(c).[5]

Concern has been expressed that EPA is, in considering the issue of practicable alternatives in a section 404(c) action, in effect "second-guessing" the Corps.

EPA's statutory role is not to duplicate the Corps' exercise of its statutory responsibility of issuing or not issuing permits. Rather, EPA's statutory role is to determine whether filling a particular aquatic site would have an "unacceptable" adverse effect on the resources enumerated in section 404(c). As a matter of common sense, as well as regulatory practice, the "acceptability" of an adverse effect may depend on the extent to which that effect is avoidable. The alternatives provisions, as well as other portions of the section 404(b)(1) Guidelines, thus are necessarily relevant to a section 404(c) determination.

Further, the mission of EPA is to protect human health and the environment. In this 404(c) proceeding, the impact of mitigation is a scientific assessment for which EPA has particular expertise. The status and uncertainty of mitigation science must be evaluated in the context of the status and certainty of natural environmental values being lost. Because the science of mitigation is, in EPA's judgment, uncertain and high-risk, the section 404(c) decision must analyze the necessity, or unavoidability, of the natural wetland loss.

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[5] Section 231.2(e) defines "unacceptable adverse effect" as:

> impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water) or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas. In evaluating the unacceptability of such impacts, consideration should be given to the relevant portions of the section 404(b)(1) guidelines (40 C.F.R. Part 230).

See also preamble to the regulation, 44 Fed. Reg. 58076 (October 9, 1979).

The Guidelines implement the CWA's goal of maintaining and restoring the chemical, physical, and biological integrity of the nation's waters. The Guidelines direct the avoidance of wetland destruction where possible, through the so-called "alternatives test."[6] When applied to wetlands, the alternatives test sets forth two rebuttable presumptions: 1) that for non-water dependent activities (such as shopping malls) there exist practicable alternatives to the discharge which do not involve wetlands; and 2) that such alternatives have less adverse impact on the aquatic ecosystem.

The rebuttable presumption that other practicable alternatives exist for nonwater dependent projects serves two functions. First and most importantly, it directs de-

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[6] Section 230.10(a) provides, in pertinent part:

1. Except as provided under section 404(b)(2) [pertaining to navigation] no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

2. An alternative is practicable if it is available and capable of being done, after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity may be considered.

3. Where the activity associated with a discharge which is proposed for a special aquatic site [defined in Subpart E to include wetlands] does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

velopment away from sensitive aquatic resources. Second, it reserves such sites for projects which by their nature require access to water. The presumption correctly and logically recognizes that non-water dependent projects can usually be located someplace other than wetlands, whereas the range of options for water-dependent projects is, by definition, usually more limited.

In the present case, one of the most contentious points is the issue of practicable, less damaging alternatives. Accordingly, this final decision now discusses whether the loss of Sweedens Swamp is an avoidable loss.

B. Practicable alternatives

To be considered "practicable" an alternative must be both feasible and available.[7] But, as indicated, the applicant must present sufficient evidence to overcome the presumption that practicable alternatives are available. The record compels the conclusion that Pyramid has not rebutted that presumption.

Feasibility

Under the Guidelines, an alternative must be capable of satisfying the basic, or overall, purpose[8] of the proposed project (taking into account cost, technology, and logistics). 40 C.F.R. §230.10(a)(2). The applicant's proposal is obviously the starting point for identifying the basic project purpose; the Guidelines' alternatives analysis does not examine alternate uses of the project site in question, but

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[7] 40 C.F.R. §230.3(q) provides: "The term 'practicable' means available and capable being done after taking into consideration costs, existing technology, and logistics in light of overall project purposes."

[8] The preamble and the regulations use the terms "basic project purpose" and "overall project purpose" interchangeably. The preamble clearly supports the position that "basic purpose" refers to the general function of the proposed activity, not its specialized details (45 Fed. Reg. 85339 (December 24, 1980)), and in practice, EPA has consistently so interpreted the terms.

rather alternate sites (or designs) for the basic project purpose. *Louisiana Wildlife Federation* v. *York*, 761 F.2d 1044 (5th Cir. 1985).

The Guidelines do not demand an acceptance of literally every aspect of a developer's characterization of his "project purpose." However, in this case, the leading alternative site is capable of serving a strikingly similar project. Pyramid's project is a shopping mall, and the search for alternatives revolves around sites suitable for a shopping mall (or alternative designs at Sweedens Swamp). As discussed below, the marketplace has found that a nearby site is suitable for a virtually identical regional shopping mall: a "quality" fashion-oriented enclosed mall with nearly the same square footage and three anchor department stores, serving the same trade area. There is no convincing basis in the record for finding that such an alternative would not serve the same "basic purpose" as Pyramid's project.

Primary attention has focused on a site known as the North Attleborough site, located immediately south of the interchange of U.S. Route 1 and I-295, approximately three miles north of Sweedens Swamp on Route 1. It is approximately 57 acres in size and is zoned for commercial use. New England Development, Inc. (formerly State Properties of New England) currently controls the site, on which it plans to build a regional shopping mall comparable in size and character to Pyramid's proposed Newport Galleria. In its July, 1984, 404 permit application, Pyramid stated that it had rejected the North Attleborough site on the grounds that it was not feasible to Pyramid's purpose, and thus, Pyramid stated, it was not a practicable alternative for its mall.

As a general matter, an applicant's submission of information clearly within its expertise is normally accepted by the Agency. Where the information seems in conflict with other available information, however, EPA must ex-

ercise its independent judgment to determine the matter at issue. Here, the marketplace evidence compels EPA to conclude that the North Attleborough site is feasible, notwithstanding Pyramid's rejection of it. As noted above, New England Development, Inc., an established developer in the region, plans a similar shopping mall at the site. The company has invested over $2 million at the mall site, has successfully pursued the necessary zoning, has done extensive engineering work, had contacted potential tenants, and has completed a State Environmental Impact Report. The willingness of an established developer to invest this time and effort into developing the North Attleborough site is strong evidence that it is a feasible site.[9] Furthermore, this already convincing market place evidence is also supported by the conclusions of an independent consultant to the Corps of Engineers in January 1985 that the North Attleborough site was a feasible site for a regional shopping mall.

As detailed in the recommended determination, Pyramid has raised numerous specific objections to the North Attleborough site in an effort to justify its own rejection of the North Attleborough site. While I believe the market place evidence is itself sufficient evidence of feasibility in this case, I nonetheless considered Pyramid's specific comments.

Pyramid contends that the North Attleborough site is "too far north" of the primary trade area it had delineated. Even accepting Pyramid's delineation of the primary trade area, I find Pyramid's arguments unconvincing on this point. The site, located near the geographic center of Pyramid's trade area, is only three miles north of Sweedens Swamp, and only six minutes (driving time) further from the densely populated sections of the trade area. It

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[9] Of course, feasibility does not guarantee success—whether for an inherently risky shopping center business or for other commercial endeavors.

is still within a 15-20 minute drive from the farthest (i.e., southern) fringe of the trade area, and it is a mere two miles west of Interstate 95. The consultant retained by the Corps states in his analysis of feasible sites that the location of the North Attleborough site is "almost ideal" from a market point of view. The marketing analysis conducted for New England Development reaches a similar conclusion. Thus, I find that the record shows that the North Attleborough site is a viable location for a shopping mall of this type, in the same trade area.

Further, Pyramid argues that the North Attleborough site is not visible from I-95 and therefore will be unable to attract sufficient shoppers. First, it should be noted that the North Attleborough site is located at an interstate highway interchange (I-295 and U.S. Route 1). The Corps' consultant's report on feasibility notes that visibility from both I-295 and Route 1 is excellent. The consultant's report also concludes that visibility in general is not an "overly important" consideration.

Pyramid asserts that highway access to the North Attleborough site is poor. However, New England Development's consultant, Realty Development Research, Inc., concludes that the site enjoys good access within the trade area. The Corps consultant also states that the location provides "excellent" road access via I-95, Route 1, Route 1A, and I-295. While the latter roads are currently less well traveled than I-95, he concludes that a mall at the North Attleborough site will create its own traffic by providing its own draw.

Pyramid also states that the site is too small to support a shopping mall. The proposed square footage and "footprint" of each development are roughly equivalent; thus the record provides no evidence that the North Attleborough site is too small.

In some of its later submissions, Pyramid states that one of the main reasons it rejected the North Attleborough

site was because of improper zoning (at the time it was evaluating the site). However, in its October 1984 supplement to its 404 permit application, Pyramid states quite clearly that the site was not rejected because of its improper zoning. Pyramid explained that "[m]ost large regional shopping center sites have zoning, infrastructure and environmental constraints at least as severe as those affecting the North Attleborough I site. Had the . . . location been acceptable, this site would have warranted our attention as a practicable alternative . . . ." In fact, the zoning of the site has, through New England Development's efforts, been changed to accommodate a regional shopping mall.

Pyramid also states that past failures at the North Attleborough site demonstrate its infeasibility. However, the same could be said for Sweedens Swamp, scene of at least two prior failures. Moreover, the record indicates that the market has been improving and is currently strong and that New England Development has not reached any major obstacles to date. Accordingly, I do not find Pyramid's reference to past failures persuasive on this point.[10] While some retailers apparently have a strong preference for locating at Sweedens Swamp (some planning to locate there have indicated that that is the only site in the market they would accept), the record nonetheless indicates that a North Attleborough mall will still be able to attract tenants, and is indeed competing vigorously for some of the same anchor stores.

Finally, Pyramid and others urge rejection of the North Attleborough site due to various practical problems, in-

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[10] Pyramid has also cited the failure of anchor stores at the Lincoln Mall on Route 295 as evidence of the unsuitability of such a location. However, the record indicates that the two anchors closed, not because of dissatisfaction with the location but rather because the retail chains of which they were part folded. The Mall quickly replaced the anchors (one replacement was in and operating in 4-5 months), and in fact the Mall is planning to expand to three or four anchors.

cluding traffic and water quality concerns, the proximity of an elementary school, and public opposition to the project. As previously noted, Pyramid itself recognizes that any large development is likely to pose difficulties that will require time, money, and proper planning to overcome, and the North Attleborough site is no exception. Some specific concerns raised by Pyramid and others are addressed in more detail in Appendix D. Here, I will simply note that many of the difficulties at the North Attleborough site also confronted Pyramid at the Sweedens Swamp site, including water quality, flooding, and traffic concerns, and the proximity of an elementary school. Public support and opposition exist at both sites. There is, in short, no evidence that the North Attleborough site presents unique or insurmountable problems.

Moreover, the fact that other established developers have elected to pursue quality regional malls in the vicinity at sites which do not meet Pyramid's stated criteria strongly suggests that Pyramid's criteria are not dispositive.[11] In Pyramid's view, the Sweedens Swamp site is by far the preferred site (with its "excellent" location, access, and visibility), and that may well be the case from strictly an economic perspective. However, whether the North Attle-

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[11] New England Development's enterprise has already been described. In addition, another developer, Marathon Group of Companies, Inc., has announced plans to build a comparably scaled quality merchandise regional shopping mall anchored by three department stores in Seekonk, Massachusetts. The Seekonk site is a 79 acre parcel of land located on the southern side of Route 6 in the town on the southern border of the City of Attleboro, and is bordered to the west by East Providence, Rhode Island. The site is within a half mile of Interstate 195, and approximately five miles from I-95 and seven to eight miles from Sweedens Swamp. The site is currently an abandoned drive-in theater and vacant land. The Seekonk site is located in the southeast portion of Pyramid's defined trade area, one of the most densely populated sections of that trade area according to Pyramid's 1983 retail market analysis. The Seekonk site would likely serve a market that significantly overlaps, but is not identical to, the market delineated by Pyramid.

borough site is or is not the *best* site within the trade area from a specific applicant's business perspective is not the issue. The practicable alternatives test requires only that other sites be feasible, not that they be equal or better.[12]

Availability

The other aspect of practicability is "availability," i.e, whether an alternative which is otherwise suitable for the basic project purpose is "available" for that purpose. The Corps and Pyramid believe that availability should be viewed as "availability to the applicant." I agree that "availability to the applicant" is the correct test to apply to this case. However, I still conclude based on the record that the North Attleborough site must be deemed available to Pyramid.

Pyramid has argued that the North Attleborough site cannot be considered available to it because a competitor controls it and presumably will not sell to Pyramid. I agree that there is no reason to believe that New England Development will sell to Pyramid.[13] However, I do not agree that the analysis should stop there.

The Clean Water Act and the 404(b)(1) Guidelines were intended to avoid unnecessary filling of wetlands and to require a prospective discharger to take a hard look *before* concluding that upland sites are not available. I do not believe that the Guidelines can, or should, be read as lim-

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[12] Since an applicant presumably usually selects the site which is best from his perspective, alternatives are almost by definition "second best;" to eliminate non-wetland sites on that basis would be inappropriate.

[13] That is not to say that New England Development could not have been talked into relinquishing its interest in the site at an earlier stage. In its October 1984 supplemental application to the Corps, Pyramid asserted (at 21), "[O]ur competitor. . .has spent little, if any, money on their attempt to develop this site. The current landowner, Allan Riley, is the primary financier of this effort. Mr. Riley is driven by a need and desire to rid himself of a vacant parcel with which he has been burdened for over five years."

iting the inquiry on availability solely to the time after an application is filed. It is both fair and consistent with the Guidelines to review the period of availability as including the period when the developer is selecting a site for its project.[14]

There are several reasons for this. First, in a situation where two parties contemporaneously enter the same market area for the same purpose, and one decides to option an upland site (thereby avoiding wetland destruction), while the other selects a wetland, such a "present ownership" test would turn the guidelines on their head and penalize the competitor who heeded the guidelines and pursued the upland site.

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[14] The issue addressed here relates particularly to circumstances where a developer or developers are entering a market area for the accomplishment of a specific project. I need not, and do not, decide here what the relevant time period would be in other circumstances—e.g., where an applicant wishes to build on property inherited or acquired long ago.

Pyramid now argues that the language of the guidelines speaks exclusively in the present tense with respect to the availability of alternatives—e.g., "An alternative is practicable if it *is* available . . ." 40 C.F.R. §230.10(a) (emphasis added). It is clear, Pyramid contends, from the use of the present tense that availability must be determined as of the time of the application.

That reading of the regulatory language is too cramped. The use of the present tense was intended to ensure a temporal matching of the requisite alternatives analysis and the availability determination. Indeed, in discussing practicability in its supplemental application to the Corps, Pyramid itself argued that the appropriate time for judging alternatives was when the applicant was reviewing alternatives and deciding on a course action. (Supp. App. at 20.)

The principal I have set forth in this case does not require (or permit) an open-ended historical review of whether an alternative site was ever available during an applicant's corporate or personal existence. Rather I have given the language the common sense reading that the review of alternatives and their availability are necessarily linked in time. This presents no conflict with either the language of the Guidelines or EPA's past practice.

able. To make such a finding would be particularly inappropriate in this case since Pyramid bought Sweedens Swamp with full awareness of the environmental concerns posed by destroying the swamp and with a full appreciation of the importance of finding an alternative site.

The special circumstances of this case argue for an additional, though subsidiary, basis for considering the North Attleborough site as one available to Pyramid. Pyramid chose to be considered as Attleboro Mall, Inc., for the purpose of avoiding the State's new stringent environmental regulation. Logic indicates that Pyramid is likewise bound by alternatives available to Attleboro Mall, Inc., and the record shows the North Attleborough site was available to Attleboro, Mall, Inc., Pyramid's acquired affiliate.

On March 13, 1985 the State Department of Environmental Quality Engineering (DEQE) granted a State permit to Attleboro Mall, Inc., an acquired affiliate of Pyramid, for the filling of Sweedens Swamp. This decision followed a lengthy adjudicatory hearing, in which one of the issues was whether Attleboro Mall, Inc.'s proposed mall could be treated as a continuation and improvement of the earlier mall proposals made by Mugar and DeBartolo,[17] or whether the revised and now Pyramid-controlled project had to start the state process anew. The DEQE agreed with Pyramid and ruled that a successor in interest could substitute itself for the prior owner and

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[17] The original notice of intent was filed by the Mugar Group, Inc./ Federated Stores Realty, Inc. in March, 1979. The local Conservation Commission's approval of the project was appealed to DEQE. During the appeal process, Mugar conveyed ownership of the Sweeden Swamp site to Attleboro Mall, Inc., then an affiliate of the Edward J. DeBartolo Corporation. In April, 1982 DEQE issued a Superseding Order to Attleboro Mall, Inc., denying the project. Subsequent to the denial, apparently in December 1983, Pyramid obtained control of Attleboro Mall, Inc. and pursued a challenge of the DEQE denial through an adjudicatory hearing.

continue in the proceedings without filing a new notice of intent.

Pyramid's claim that it should assume the rights of the original applicant for the State permit meant that Pyramid's proposal was evaluated by the State under regulations that had been in force at the time of the original permit application, rather than under the more stringent regulations which took effect in 1983. The applicability of the old regulations was critical to Pyramid since the new regulations prohibit the filling of more than 5000 square feet of bordering vegetated wetlands.[18] 310 C.M.R. 10.55. This fact was acknowledged by the State in its final decision.

Since Pyramid acquired the rights of its predecessor, logic would have it be bound by the obligations of its predecessor—including the obligation to choose an upland alternative. I believe that alternatives available to Attleboro Mall, Inc. while it was under the control of either DeBartolo or Pyramid should be considered.[19]

The North Attleborough site is one such site. It was clearly available for purchase prior to New England Development's acquisition of control over it. In fact, the record indicates that the DeBartolo Corporation expressed an interest in the site to a local realtor who was offering it, and even exchanged some papers, but did not pursue an acquisition. These circumstances reinforce the conclusion that Pyramid has not met its burden of proving that the North Attleborough site was not available to it.

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[18] Pyramid proposes to fill approximately 1,400,000 square feet of bordering vegetated wetlands.

[19] The Newport Galleria Group, another Pyramid affiliate, applied for the federal permit. On February 10, 1985, Attleboro Mall, Inc. conveyed the Sweedens Swamp site to the Newport Galleria Group for $10.00.

C. Less environmentally damaging alternatives and mitigation

The alternatives requirement also takes in account comparative environmental impacts. The alternatives test provides that "no discharge of dredged or fill material may be permitted if there is a practicable alternative to the discharge *which would have less adverse effect on the aquatic ecosystem*, so long as the alternative does not have other significant adverse environmental consequences." 40 CFR §230.10(a) (emphasis added). However, alternatives "which do not involve a discharge into a [wetland] are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise." §230.10(a)(3) (emphasis added).[20]

Turning to this case, the record demonstrates beyond doubt that locating a shopping mall at the North Attleborough site would have less adverse impact on the aquatic ecosystem.[21] For example, the North Attleborough site has less than one acre total wetlands, scattered in small pieces, compared to the 32 acres to be filled at Sweedens Swamp. (Although New England Development plans some retention

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[20] As noted by both the Corps of Engineers and the recommended determination, a threshold issue is whether offers of mitigation (i.e., compensatory wetland creation) should be considered in comparing the impacts of the project at the proposed site and at alternate sites. General Wall's "Views of the Chief of Engineers" recognized that allowing compensatory mitigation to be factored into the alternatives analysis "is somewhat problematic, because if not implemented carefully, it could serve to weaken or subvert key provisions of the current 404(b)(1) Guidelines" and be counter to the Guidelines' obvious intent (although he concluded that exceptions could be made in "proper cases"). For the reasons discussed below, I conclude that mitigation should not be included in my alternatives analysis in this case. Accordingly, the following environmental analysis of the alternate sites identified above properly focuses on the impacts of the project without the "add-on" mitigation.

[21] In fact, this is so even if one were to consider Pyramid's onsite mitigation offer as part of the project itself.

basins on an adjacent parcel which has some larger wetlands, the basins will not encroach on those wetlands.) Furthermore, construction of a mall there need not have more impacts of concern downstream than at Sweedens Swamp.

Under the Guidelines, the alternatives inquiry does not end here. I must also consider whether there are other significant adverse environmental impacts. As a general matter, both sites will accommodate the same basic project; and there is nothing in the record to suggest that air, noise, trash, etc., impacts of a mall will not be largely comparable at Sweedens Swamp and the North Attleborough alternative site. The regulations contemplate that only unusually significant upland impacts would override wetland impacts. No such significant impacts are present in this case. In fact, the Corps concluded that, mitigation aside, the North Attleborough site "has much less value for wildlife" than does Sweedens Swamp.

I recognize that both the wetland and upland at issue here offer "wildlife" habitat. However, wetlands are scarcer than uplands and historically have been lost at a much higher rate. In addition, wetlands serve a variety of ecological functions of which wildlife habitat is only one. For example, these functions include significant water purification functions, flood and storm water storage, groundwater recharge or discharge areas, and food chain production, spawning and rearing sites as well as general habitat. Hence, as a generality, acre per acre, loss of wetlands is considered more significant than development of uplands. Furthermore, in this case, Sweedens Swamp serves as a more effective sheltering urban island habitat. Also, the larger habitat complex, of which the North Attleborough site is part of, unlike Sweedens Swamp, will continue to provide wildlife support functions even if a mall is built.

Finally, I have considered the question of whether Pyramid's proposed offsite creation of a new wetland should be viewed as establishing the Pyramid project as "environmentally preferable" to any other alternative.

This case involves an extensive wetland fill, and an evolving offer to create a large scale wetland complex out of a mostly upland gravel pit. The record raises concerns about the short-term and long-term viability of the mitigation, as well as its enforceability. Under the circumstances, given the large size of the proposed mitigation, the state of the science of artificial wetland creation, the purpose of the alternatives analysis, and the avoidability of the loss of this particular wetland of proven value, I do not believe that the proposed mitigation plan is of such clear environmental benefit that it can justify the unnecessary destruction of an existing wetland.

The offsite mitigation proposed here involves creation of a 36 acre wetland from 30 acres of upland gravel pit and 6 acres of open water at Tiffany Street, over a mile from Sweedens Swamp. The plan calls for the excavation to create weepage faces of groundwater to induce surface water flow, and the mixing of peat with the top foot of substrate to create a "wet mix" to provide conditions to enhance the growth of wetland vegetation (mostly emergent herbaceous vegetation and some shrubs, rather than trees). The onsite mitigation proposal involves the excavation of 9 acres of upland and the conversion of 13 acres of wooded swamp, to create 22 acres of open water habitat and marsh. Pyramid has said it would not challenge EPA if EPA required that the Tiffany Street site be completed prior to construction of the Mall. Pyramid has also stated at various times that it believes that establishment of the Tiffany Street site would take only a few months or 1-3 growing seasons,[22] although scientific uncertainties asso-

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[22] See e.g., affidavit of John A. Bersani, dated August 23, 1985, at paragraph 29.

ciated with such a large man-made wetland, created from predominantly upland, suggest that that is optimistic. The onsite mitigation would necessarily require the concurrent alteration of Sweedens Swamp.

Without in any way questioning Pyramid's good faith, I nonetheless believe that this proposal presents substantial risks and uncertainties. While considerable work has been done in wetland restoration and enhancement, the science of wetland *creation* is much less advanced. This is not surprising considering that when wetlands are artificially created, a successful combination of engineering and environmental management techniques is required in order to attempt what it may take natural systems centuries to do.

For example, analysis of the literature indicates that simply creating the requisite "structure" does not guarantee that a wetland ecosystem will function as intended.[23] Indeed, the preface (at pp. 4, 11) to the Massachusetts wetland regulation premises its blanket prohibition against filling more than 5,000 square feet of bordering vegetated inland wetlands on the fact that "[t]he complex natural functions of these wetlands cannot be replicated, and no amount of engineering will enable such areas to be filled or substantially altered without seriously impairing the statutory interests they serve," particularly water quality and habitat. For these reasons, Pyramid's offer of a 5-year performance bond is of limited utility to ensure success of mitigation.

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[23] LaRoe, E.T. 1979. The biological basis for estuarine ecosystem mitigation, pp. 90-92. In G.A. Swanson (Technical Coordinator) 1979. The Mitigation Symposium: A National Workshop on Mitigating Losses of Fish and Wildlife Habitats. General Technical Report Station, USDA Forest Service, Fort Collins, Co.; Gonor, J.J. 1979. Id. at 92-93: Race M.S. and Christie, D.R. 1982. Coastal Zone Development: Mitigation, Marsh Creation and Decision-making. Environmental Management 6:317-328.

Moreover, particularly until it is well established, a created wetland is especially vulnerable to a number of forces. These include fluctuations in its energy signature (i.e., fluctuations in hydroperiod, hydrologic energy, and nutrient availability), factors that shape the wetland development process (i.e., temperature, fire frequency, salinity, and herbivores), and colonization by pioneering species, many of which are noxious weeds that are not indigenous species (i.e., purple loose-strife and other "nuisance" plants are prone to invade and dominate disturbed wetland areas). Even if the above vulnerabilities are overcome, it can take seasons until an inland marsh is established, and decades for a shrub or wooded swamp. Consequently, it takes a considerable period of time to be sure that a wetland has become successfully established and even then there is some uncertainty as to how well it will function, both objectively and relative to the wetland it is designed to replace. These uncertainties, and the consequent need for long-term monitoring, increase with the size of the project.[24]

Pyramid's proposal involves frontiers of science. It appears to be one of the largest wetland creation projects of its type to date. (While larger scale projects have been cited, such as the Ducks Unlimited effort in Canada, they involve essentially wetland enhancement, not creation.) The site presents complicated questions of hydrology. No satisfactory source of peat for the wet mix has even been identified to date. At the Corps' request, Pyramid has submitted extensive historical records on precipitation, groundwater and surface water fluctuations as well as information on the hydrological performance of the wet mix, which the Corps is still evaluating in an effort to address the uncertainties of Pyramid's offsite mitigation's success.

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[24] *Wetlands: Their Use and Regulation*, Washington, D.C., U.S. Congress, Office of Technology Assessment, OTA-0-206, March 1984.

Those uncertainties take on a particular importance in light of the fact that the mitigation is proposed to replace an existing, stable, functioning wetland whose loss is unnecessary. I must consider the role of mitigation in light of the purpose of the alternatives analysis to avoid loss of wetlands where possible. As the preamble to the Guidelines notes, that purpose "was to recognize the special values of wetlands and to avoid their unnecessary destruction, *particularly* when practical alternatives were available in non-aquatic areas to achieve the basic purposes of the proposal." 45 Fed. Reg. 85339 (December 24, 1980). I cannot find that the policies of the Guidelines, or indeed the Act, would be well served by assuming the risks of Pyramid's proposed wetland creation where there is a feasible, available, upland alternative. The availability of the mitigation option in such a case would undercut the incentive to seriously and carefully examine non-wetland alternatives.

The Corps also expressed concern about the precedential significance of allowing a mitigation proposal to obviate the alternatives test, but believed that the approach it took in this case could be confined to a limited and proper set of circumstances. I am not so confident. This is not a minor project; it is not a scientifically certain project. To accept it under these conditions would, in my view, encourage developers to seek novel mitigation measures, not alternatives, and would undermine the predictability of the permit process. We would find ourselves drawn, as in this case, into assessments of mitigation approaches for which we will be able to make, at best, only qualitative judgments based on uncertain knowledge. As the technology develops, there might well be a case in which even offsite, out of kind wetland creation would be so beneficial and so reliable as to justify an exception. This plainly is not the case here.

Furthermore, Pyramid's proposal, even if successful, would not provide the same kind of habitat as that which

would be lost at Sweedens Swamp. Sweedens Swamp is a wooded swamp which provides vertical heterogenity, and heavy cover, and supports a particular mix of bird, mammal, and amphibian species. The Tiffany Street site, if successful, would provide largely marsh and open water, with some shrub swamp, and would be designed to support a somewhat different mix of species. It is also physically separate from Sweedens Swamp, with no ground corridor between the two.

These differences further reinforce my conclusion that it would be inappropriate in this case to let an offer of manmade wetlands override the Guidelines' policy of avoiding losses where practicable. The aquatic ecosystem is one in which each piece plays a role in the whole. Wetlands are not fungible (that is, ecologically interchangeable). Thus, when one creates a mitigation wetland, one is not necessarily restoring what was lost, one is simply attempting to compensate. Even where two wetlands both serve the same generic "wildlife habitat" function, there may still be differences which prevent their being wholly interchangeable. The extent of discrepancy between what one loses and what one creates is not fixed; it obviously increases as one substitutes one kind of wetland (e.g., marsh) for another kind of wetland (e.g. swamp) or for open water; as the distance between the former and new wetlands increases; or as other variables are introduced. In short, even if one assumes created wetlands will be successfully established, there are fundamental questions about what wetland compensation can promise as true replacement.[25]

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[25] In a recent study of wetland use and regulation undertaken by the Office of Technology Assessment at the request of Congress, the authors warned of the need for judicious review by federal agencies of wetland construction proposals:

> *The ability to construct new wetlands should not be used as sole justification for the unregulated conversion of wetlands to other*

I do not mean to downplay the value of mitigation in the appropriate context. Where a wetland loss *is* unavoidable and the discharge does not cause or contribute to "insignificant degradation," EPA encourages consideration of mitigation. Furthermore, manmade wetlands may play a valuable role in waste water management. Indeed, EPA is devoting resources to research in both those areas. However, the case before me does not involve either of those situations.

VI. FINAL DETERMINATION

The mission of the Environmental Protection Agency is to protect human health and the environment. In interpreting our administrative responsibilities as mandated by law, regulation and administrative directive, we must conduct our activities with fulfilling that mission constantly in mind.

The Clean Water Act, section 404, directs a special emphasis to our nation's waters, including special aquatic sites such as wetlands. Regulations written pursuant to Section 404(b)(1) incorporate a crucial environmental standard that forbids avoidable destruction of wetlands. The question of avoidability is answered through the practicable alternatives test, more commonly known as the "water dependency" test. The section 404(b)(1) Guidelines direct that when a project which is not water-dependent (for example, a shopping mall, which need not be constructed on or near waters of the United States) is proposed for a permit to fill waters of the United States, there must be a rebuttal of the regulatory presumption that there are no upland alternatives available to meet its objective.

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uses: manmade wetlands do not necessarily provide the same values as natural ones. (emphasis in original)

Office of Technology Assessment report, *supra* at 117, 130-31

Section 404(c) of the Clean Water Act provides the Environmental Protection Agency the authority and responsibility to review and to condition or prohibit discharges into waters of the United States when certain unacceptable environmental effects would result from the project's construction.

Mindful of the mission of this Agency, the intent of the Clean Water Act, historical loss of approximately half of United States' wetlands, and the continued cumulative national loss of approximately 300,000 wetland acres annually, which affects wildlife, flood protection and water quality, fish, shellfish, and water supply, I began a careful review of the case before me.

Sweedens Swamp is a typical well-established, functioning, red maple swamp which provides excellent wildlife habitat for a variety of birds, mammals, and amphibians, and provides flood storage capacity, groundwater discharge and water purification. Pyramid's proposed shopping mall will result in the destruction of approximately 45 out of 49 acres of this wetland habitat. Thirty two acres would be permanently destroyed, and although Pyramid has offered to recreate other wetlands on the site, doing so would result in the at least temporary destruction of 13 of the remaining 17 acres of wetland habitat. These losses are not necessary in order to have a quality fashion-oriented regional shopping mall. There is at least one practicable alternative site in the same market which was rejected by Pyramid on grounds of infeasibility, not availability to Pyramid, when it was investigating the trade area prior to selecting Sweedens Swamp. In short, filling Sweedens Swamp would result in significant avoidable loss of wildlife habitat.

I must now determine whether this loss is "unacceptable" within the meaning of section 404(c). The context in which the particular loss would occur is important to this inquiry. The filling of Sweedens Swamp would be the

largest authorized wetland loss in Massachusetts in at least 5 years. Historically, there has been a significant cumulative loss of wetlands in Massachusetts; upwards of 50% of the wetlands in the State have been lost to date. This loss is of great concern to the State. The Massachusetts wetlands regulations were recently revised to put more stringent limitations on wetlands destruction. Activities causing the loss of more than 5,000 square feet of bordering inland wetlands (the type of Sweedens Swamp) are effectively prohibited under the new regulations. Moreover, the Massachusetts Association of Conservation Commissions and a large number of its members have expressed grave concern over the cumulative impact of similar losses. (Conservation Commissions are appointed bodies responsible for applying Massachusetts' wetland regulations at the local level.) EPA may take cognizance of these facts as reflecting the importance of the remaining wetlands in the State.

Based on the excellent wildlife value of the wetland in question, its size and setting, the avoidability of the loss, and the significance of such areas in Massachusetts, I conclude that filling Sweedens Swamp to build the proposed mall would have unacceptable adverse effects within the meaning of section 404(c).

Pyramid offered to create a 36 acre artificial marsh wetland as compensation for the destruction of the red-maple swamp known as Sweedens Swamp. I do not interpret the Section 404(b)(1) guidelines as allowing mitigation as a remedy for destroying wetlands when a practicable alternative exists. Nor does the state of the science of man-made wetland creations comfortably allow me to recommend at this time that man-made creations of wetlands should obviate the need for an alternatives test, particularly for non-water-dependent projects.

The Environmental Protection Agency has, because of its expertise and responsibility, a strong concern over the

scientific uncertainties of artificially-created wetlands, and thus such artificial wetlands' use must be conservatively applied. I am, therefore, anxious that we do not set a precedent across this nation of substituting artificial wetlands for natural, functioning wetlands without consideration of the need for destroying those natural wetlands; we simply do not have the scientific ability to certify what techniques will assure the success of such man-made creations. If we established the precedent to allow these substitutions without regard to need, the Army and EPA would be called upon continuously to judge wetland creations as replacements for natural wetlands—and the state of the science is such that we cannot make such judgments with acceptable risk to precious and dwindling natural resources.

The Environmental Protection Agency does encourage mitigation efforts for unavoidable losses of wetlands where the project did not cause or contribute to significant degradation of waters of the United States, and supports continued research in wetland creation. However, as I examined Pyramid's mitigation plan, and the conditions which would be needed to ensure that the created wetlands would be successful, I became even more convinced of the risks involved for a project which is not water-dependent, and which would unnecessarily destroy natural wetlands of proven environmental value.

After considering the full record, I determine that the construction of a shopping mall in Sweedens Swamp would cause unacceptable adverse effects on wildlife and wildlife habitat, and under the authority delegated to me by the Administrator of the Environmental Protection Agency, therefore hereby prohibit the use of the site for the proposed fill.

May 13, 1986
Date

/s/Jennifer Joy Wilson
Jennifer Joy (Hanson) Wilson

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket Nos. 87-6275, 87-6295

FILED
SEP 02 1988

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 2nd day of September one thousand nine hundred and eighty-eight,

JOHN A. BERSANI, NEWPORT GALERIA GROUP, ROBERT J. CONGEL and the PYRAMID COMPANIES,

Appellants,

V

JOSEPH ROBICHAUD and CITIZENS IN SUPPORT OF ATTLEBORO MALL,

Intervenor-Plaintiffs-Appellants,

HOME BUILDING ASSOCIATION OF MASSACHUSETTS,

Intervenor-Plaintiff,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ARMY CORPS OF ENGINEERS, LEE THOMAS, in his official capacity as Administrator of the United States Environmental Protection Agency, RICHARD K. DAWSON, in his official capacity as Assistant Secretary for Civil Works, United States Army, and JENNIFER JOY WILSON, in her official capacity as Assistant Administrator for External Affairs, United States Environmental Protection Agency,

Appellees,

SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, NATIONAL WILDLIFE FEDERATION, NATIONAL AUDIBON

scientific uncertainties of artificially-created wetlands, and thus such artificial wetlands' use must be conservatively applied. I am, therefore, anxious that we do not set a precedent across this nation of substituting artificial wetlands for natural, functioning wetlands without consideration of the need for destroying those natural wetlands; we simply do not have the scientific ability to certify what techniques will assure the success of such man-made creations. If we established the precedent to allow these substitutions without regard to need, the Army and EPA would be called upon continuously to judge wetland creations as replacements for natural wetlands—and the state of the science is such that we cannot make such judgments with acceptable risk to precious and dwindling natural resources.

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Appellees,

SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, NATIONAL WILDLIFE FEDERATION, NATIONAL AUDIBON

SOCIETY, CONSERVATION LAW FOUNDATION OF NEW ENGLAND, INC., MASSACHUSETTS AUDIBON SOCIETY, CITIZENS FOR RESPONSIBLE ENVIRONMENTAL MANAGEMENT, MASSACHUSETTS SOCIETY FOR CONSERVATION PROFESSIONALS, AUDIBON SOCIETY OF RHODE ISLAND, RHODE ISLAND ASSOCIATION OF CONSERVATION COMMISSIONERS and NATURAL RESOURCES DEFENSE COUNCIL,

Intervenor-Defendants.

Petitions for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsels for the Appellants JOHN A. BERSANI, NEWPORT GALERIA GROUP, ROBERT J. CONGEL and the PYRAMID COMPANIES, and Intervenor-Plaintiffs-Appellants JOSEPH ROBICHAUD and CITIZENS IN SUPPORT OF ATTLEBORO MALL.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that the vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith,
Clerk

APPENDIX E

TITLE 33—NAVIGATION AND NAVIGABLE WATERS

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary of the Army (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a dis-

posal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

APPENDIX F

SUBPART B—COMPLIANCE WITH THE GUIDELINES

40 C.F.R. § 230.10 Restrictions on discharge.

Although all requirements in § 230.10 must be met, the compliance evaluation procedures will vary to reflect the seriousness of the potential for adverse impacts on the aquatic ecosystems posed by specific dredged or fill material discharge activities.

(a) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

(1) For the purpose of this requirement, practicable alternatives include, but are not limited to:

(i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters;

(ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters;

(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

(3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in Subpart E) does not require access or proximity to or siting within

the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

(4) For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines. On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under this paragraph or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines. In the latter case, it may be necessary to supplement these NEPA documents with this additional information.

(5) To the extent that practicable alternatives have been identified and evaluated under a Coastal Zone Management program, a section 208 program, or other planning process, such evaluation shall be considered by the permitting authority as part of the consideration of alternatives under the Guidelines. Where such evaluation is less complete than that contemplated under this subsection, it must be supplemented accordingly.

Supreme Court, U.S.
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(2)

No. 88-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN A. BERSANI, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONSE OF JOSEPH ROBICHAUD and CITIZENS IN SUPPORT OF ATTLEBORO MALL

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

RESPONSE OF JOSEPH ROBICHAUD and CITIZENS IN SUPPORT OF ATTLEBORO MALL

Respondents Joseph Robichaud and Citizens in Support of Attleboro Mall, hereby file their response to the Petition for Writ of Certiorari filed by John A. Bersani, *et al.*, pursuant to Supreme Court Rule 19.6, and state that they support the instant petition.

Respondents Joseph Robichaud and Citizens in Support of Attleboro Mall intervened in the courts below as party plaintiffs-appellants in support of petitioners John A. Bersani, *et al.*, and also filed a Petition for Writ of Certiorari in the instant case on December 1, 1988, which was docketed as *Joseph Robichaud, et al. v. United States Environmental Protection Agency, et al.*, No. 88-929.

As noted in our petition, the EPA vetoed the fill permit on essentially two grounds: "[1] the avoidability of the loss [of

wildlife habitat] and [2] the significance of such areas in Massachusetts." *Robichaud* Pet. at 6 (citing to EPA's Final Decision at App. 107a). The Petition filed by John A. Bersani essentially focuses upon the first grounds of the denial insofar as the EPA's conclusion that the loss was avoidable was premised on the EPA's finding that there was allegedly an alternative site for the project available at the time Bersani entered the market. This "market entry" theory of determining whether there are practicable alternative sites is arbitrary and capricious as set forth in Bersani's Petition and we support that argument.

The petition filed by Joseph Robichaud focuses on the second reason articulated by the EPA for denying the permit, *i.e*, the cumulative loss of wetlands at sites unrelated to the site in question. We argue that such considerations violate the plain meaning of the Section 404(c) of the Clean Water Act, and therefore, the EPA acted outside of its jurisdiction.

Since both of the issues presented directly relate to the agency's stated reasons for denying the permit, we suggest that should certiorari be granted in these cases, that they be consolidated for purposes of briefing and argument.

Respectfully submitted,

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No. 88-902, No. 88-929

In The

Supreme Court Of The United States

October Term, 1988

JOHN A. BERSANI, *et al.*,

Petitioners,

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Repondents.

JOSEPH ROBICHAUD, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petitions For Writs of Certiorari
To the United States Court of Appeals
For The Second Circuit

BRIEF FOR RESPONDENTS CONSERVATION LAW FOUNDATION OF NEW ENGLAND, *ET AL.*, IN OPPOSITION

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The list of respondents in the petitions by John A. Bersani *et al.* and Joseph Robichaud *et al.* omitted respondents Massachusetts Wildlife Federation and Massachusetts Association of Conservation Commissions, who intervened as defendants-appellees on behalf of respondents United States Environmental Protection Agency in the courts below.

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No. 88-902, No. 88-929

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BRIEF FOR RESPONDENTS CONSERVATION LAW FOUNDATION OF NEW ENGLAND, *ET AL.*, IN OPPOSITION

STATEMENT OF THE CASE

A. Introduction

This case involves challenges to the decision of the U.S. Environmental Protection Agency ("EPA") to prohibit the construction of a shopping mall by petitioners Bersani *et al.* ("Pyramid") in a Massachusetts wetland known as Sweedens

Swamp. Using the authority granted to it in § 404(c) of the Clean Water Act, 33 U.S.C. § 1344(c), EPA determined that filling Sweedens Swamp would have unacceptable adverse effects on wildlife, effectively vetoing a permit that the U.S. Army Corps of Engineers ("the Corps") proposed to issue to Pyramid for the mall. EPA's action was upheld by the United States District Court for the Northern District of New York, 674 F. Supp. 405 (N.D.N.Y. 1987), and affirmed on appeal by the United States Court of Appeals for the Second Circuit. 850 F.2d 36 (2d Cir. 1988).

EPA's action reflected the fundamental purpose of § 404 of the Clean Water Act: to protect wetlands from unnecessary destruction. The principal goal of the § 404 program is to keep development out of wetlands if it can occur on upland sites and still fulfill project purposes. *See* 40 C.F.R. § 230.10(a). EPA's decision to prohibit filling Sweedens Swamp was based upon its finding that Pyramid had ignored an available upland site where its project could have been built, averting serious adverse impacts upon wildlife dependent upon the swamp for habitat.

Pyramid now seeks to argue to this Court that it should not be held responsible for its decision to bypass the alternative site because, by the time it submitted its permit application, that site had fortuitously been acquired by another developer.[1] EPA determined, however, that its regulations required consideration of

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[1] Ironically, after arguing strenuously to the Corps and EPA that the upland site in question was unsuitable for its project, Pyramid is itself now constructing a major shopping mall on that site as part of a joint venture with the other developer. Respondents Conservation Law Foundation of New England *et al.* learned of Pyramid's decision to build a mall on the alternate site through news reports while the parties' respective motions for summary judgment were pending before the district court. Affidavits subsequently filed by Pyramid in response to respondents' discovery requests averred that Pyramid still needed the § 404 permit at issue in this litigation, but did not say whether the mall described in its permit application would still be built at the Sweedens Swamp site. Since the joint venture agreement between Pyramid and the other developer was at that time still in draft form, respondents did not argue that the case was moot. Respondents are now seeking further information on the status of the joint venture and Pyramid's plans for Sweedens Swamp.

alternative sites available to Pyramid during its planning process, at the time of "market entry," when it could most readily avoid siting its project in a wetland. EPA's interpretation of its own regulations on this point was upheld by the district court and the court of appeals.

As the courts below found, EPA's protection of Sweedens Swamp was reasonable and consistent with EPA's regulations, its wetland protection policy, its statutory authority under § 404(c), and the overall objectives of the Clean Water Act. The aspect of EPA's decision for which *certiorari* is sought is, moreover, narrowly addressed to the unusual circumstances of this case, in which an available upland site ignored by the permit applicant during its project planning fortuitously became unavailable prior to submission of the formal permit application. For these reasons, respondents Conservation Law Foundation of New England *et al.*, thirteen nonprofit state and national conservation organizations,[2] submit that further review by this Court is not warranted.

B. Statutory and Regulatory Framework

The Clean Water Act, enacted in 1972, sets forth a bold objective of maintaining and restoring the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a). Responsibility for administering the Act lies with EPA except as otherwise expressly provided. 33 U.S.C. § 1251(d).

Section 404 of the Act, 33 U.S.C. § 1344, creates a permit program for any discharge of dredged or fill material into the waters of the United States, including wetlands. Congress divided the responsibilities for administering § 404 between EPA and the U.S. Army Corps of Engineers (the "Corps"). It placed the actual

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[2] Respondents include the Conservation Law Foundation of New England, the Sierra Club, the Environmental Defense Fund, the National Wildlife Federation, the Massachusetts Wildlife Federation, the National Audubon Society, the Massachusetts Audubon Society, Citizens for Responsible Environmental Management, the Massachusetts Association of Conservation Commissions, the Massachusetts Society for Conservation Professionals, the Audubon Society of Rhode Island, the Rhode Island Association of Conservation Commissioners, and the Natural Resources Defense Council. None of these organizations has a corporate parent, subsidiaries, or any publicly held stock.

permitting authority with the Corps, but in considering permit applications the Corps must apply guidelines promulgated by EPA, in consultation with the Corps, pursuant to § 404(b). These "guidelines" are in fact regulations binding on the Corps and the public. *See* 33 U.S.C. § 1344(b)(1); 33 C.F.R. § 323.6(a).

A basic policy of the EPA guidelines is that wetlands not be needlessly destroyed. The guidelines forbid destruction of wetlands, which are "special aquatic sites," 40 C.F.R. §§ 230.3(q-1), 230.41, if there is a practicable alternative. § 230.10(a). Where the activity is not water-dependent, *i.e.*, where the activity "does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic project purpose," such alternatives are presumed to exist unless the permit applicant clearly demonstrates otherwise. *Id.*

Although the Corps has the initial permitting authority for § 404, EPA exercises a "veto power" under § 404(c). Under this exclusive authority, EPA may deny or restrict the use of any area for disposal of dredged or fill material whenever it determines that such disposal "will have unacceptable adverse effect" on specified natural values, including wildlife. 33 U.S.C. § 1344(c). Section 404(c) empowers EPA to prohibit filling a wetland even after the Corps issues a permit authorizing disposal at that site.

C. Factual and Procedural Background

Sweedens Swamp is a New England red maple swamp, some 50 acres in size, located at the intersection of two major highways in Attleboro, Massachusetts. The swamp has been found to provide "excellent wildlife habitat" by EPA, the U.S. Fish and Wildlife Service, the Corps, and the state wildlife agency. JA 41, 140, 320.[3]

In 1984 Pyramid submitted an application to the Corps for a § 404 permit to fill large portions of the site for a proposed shopping mall. In its application and supplemental application, Pyramid insisted that marketing considerations rendered alternative sites in the area, particularly one nearby in North Attleboro,

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[3] References to the Joint Appendix filed in the court below are as follows: "JA ___." References to the Appendix filed with Pyramid's Petition are as follows: "App. A___."

Massachusetts where another developer proposed to build a similar shopping mall, infeasible for its project. Pyramid stated that it would not accept the North Attleboro site even if it were offered "for free," with all necessary permits and approvals. JA 361. Because recent changes in that site's zoning had facilitated its use for a shopping mall, Pyramid also insisted -- in sharp contrast to the argument it now advances -- that the practicability of alternative sites be measured, not as of the time it submitted its application, but at an earlier time when it was making its siting decision. JA 374.

Finding that Pyramid had failed to demonstrate that alternative upland sites for its project were unavailable, the Corps' regional office recommended denial of the permit. JA 209. That recommendation was overruled by the Corps' Director of Civil Works, who embraced a novel theory, abandoned by Pyramid in this litigation, that Pyramid could eliminate the adverse effects of the project on Sweedens Swamp by constructing an artificial wetland elsewhere. JA 109. Under direction from Corps headquarters, the Corps' regional office proposed to issue the § 404 permit in June 1985.

In July 1985 EPA commenced veto proceedings pursuant to § 404(c). Following public hearings and opportunity for comment, EPA's Assistant Administrator for External Affairs issued a Final Determination in May 1986, prohibiting the project because it would have unacceptable adverse impacts on wildlife. App. C. Like the Corps' regional office, EPA found that Pyramid had failed to demonstrate that alternative sites were not available for its project. As EPA noted, "The uncontested fact is that Pyramid never checked the availability of the North Attleboro site during its investigation of the market, notwithstanding its knowledge that Sweedens Swamp suffered from significant environmental constraints." App. C 94a.[4] EPA rejected Pyramid's contention that the current unavailability of the North Attleboro

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[4] The North Attleboro site had been purchased by another developer in 1983, during the approximate period when Pyramid was evaluating the market for a location for its own project. The record submitted by Pyramid was ambiguous, at best, concerning whether Pyramid had begun investigating the Attleboro real

site shielded it from responsibility for its decision to bypass an upland site during its planning process, ruling that the availability of alternatives to the applicant should under these circumstances be assessed as of the time it made its siting decision (as Pyramid had earlier advocated with respect to the practicability of such alternatives). *Id.* 92a-93a.

Because filling Sweedens Swamp would inflict serious damage upon wildlife values, and because that damage appeared avoidable, EPA concluded that the wildlife impacts of the project were unacceptable under § 404(c). *Id.* 106a-107a.[5]

Pyramid then commenced this action against the Corps and EPA, challenging EPA's action and seeking to compel issuance of a permit. In October 1987 the district court granted summary judgment to the government and to respondents, who had intervened as defendants. That judgment was affirmed on appeal by the Second Circuit in June 1988.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Nor does the decision of the court of appeals involve an important question of federal law which should be decided by this Court. Accordingly, review by this Court is unwarranted.

1. The Decision of the Court of Appeals is Correct

EPA's decision to prohibit the destruction of Sweedens Swamp, upheld by the court of appeals, was fully consistent with its regulations, its wetlands protection policy, statutory require-

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estate market prior to the purchase of the North Attleboro site. Pyramid refused to provide further information to EPA concerning its market investigation. EPA accordingly concluded that Pyramid had not met its burden under 40 C.F.R. § 230.10(a)(3) of demonstrating that the alternative site had been unavailable. App. C 94a-97a.

[5] EPA also rejected the position of the Corps' Director of Civil Works that an applicant may freely substitute an artificial wetland for a natural one, finding substantial scientific uncertainty regarding the viability of artificial wetlands. App. C 100a-105a.

ments, and the broad objectives of the Clean Water Act. EPA acted to prevent the unnecessary destruction of a wetland for a non-water-dependent project, in conformance with the clear direction of the guidelines it promulgated under the authority of § 404(b)(1) of the Clean Water Act. Those guidelines establish presumptions, rebuttable only by clear evidence from the permit applicant, that alternative upland sites are available for a project such as Pyramid's shopping mall. On the complex administrative record developed during the Corps' permit review and EPA's subsequent § 404(c) proceeding, EPA concluded that Pyramid failed to demonstrate that an alternative site had not been available for its project.[6] Finding that the loss of Sweedens Swamp would entail serious adverse impacts on wildlife, and that those impacts appeared to have been avoidable, EPA quite properly concluded that the adverse impacts on wildlife were unacceptable under § 404(c), effectively vetoing the permit.

Pyramid seeks to argue to this Court that EPA and the court of appeals erred in looking to the period when it selected the site for its project, when an alternative site was available to it. Pyramid contends that the availability of alternatives should have been assessed only as of the later time when it filed its permit application, after the upland alternative site had fortuitously been purchased by another developer. As the court of appeals correctly found, however, EPA acted reasonably in looking to the time period when actual siting decisions were made by the applicant, since that is the time when the applicant can most readily avoid needless location of its project in a wetland. Interpretation of EPA's guidelines to extend to the site-decision period thus directly

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[6] Contrary to Pyramid's contention, EPA's finding on this point did not violate its burden of proof under § 404(c). EPA's responsibility in invoking its authority under § 404(c) is to justify its action. *See* 45 Fed. Reg. 85,336, 85,338 (1980). That responsibility does not alter the substantive burden placed by the guidelines on a permit applicant to "clearly demonstrate" that practicable alternatives are unavailable. 40 C.F.R. § 230.10(a)(3). Failure by an applicant to sustain that burden in its application plainly provides an appropriate basis for EPA to veto a proposed permit. EPA's Final Determination clearly states the basis for its action in this case, and fully satisfies its burden.

furthers the guidelines' underlying policy, which is to steer private development away from wetlands wherever possible. Pyramid itself had earlier argued strenuously to the Corps that the practicability of alternatives should be assessed as of the time of its site decision, rather than as of the later time of permit application, on the grounds that to do otherwise would be fundamentally unfair to the developer. JA 374. Thus, the decision of the court of appeals was correct, and, as it does not conflict with the decision of any other court of appeals, does not warrant this court's review.

2. Pyramid's Petition Does Not Raise an Important Issue of Federal Law

Even apart from the correctness of the decision below, the Court should note that the decision involves a very narrow issue, applicable only in the highly unusual circumstances of this case. EPA expressly limited its decision to the circumstance where a developer enters the market area for the accomplishment of a specific project; it did not address, and the court of appeals decision should not be read as extending to, the relevant time period for analysis of alternatives under other circumstances, as where an applicant wishes to build upon property acquired or inherited long before. App. C 93a. Even with respect to applications from developers entering a new market, analysis of alternatives at the time of market entry will affect applicants only under the most unusual of circumstances: only where an available upland alternative ignored by a developer becomes unavailable fortuitously prior to actual submission of the permit application, and only where there are no *other* alternative sites for the project at the time of application.[7]

Contrary to the ominous claims of Pyramid and *amici*, therefore, the court of appeals' decision will have little effect on the normal processing of § 404 applications. Few applications, if any,

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[7] Respondents note that the administrative record in this case indicates that several other alternative sites exist for Pyramid's project, apart from the North Attleboro site whose availability is at issue in this litigation. JA 161, 168-71. The availability of other alternative sites would support a decision by EPA to prohibit this project even if this Court were to reverse the court of appeals regarding the availability of the North Attleboro site.

will duplicate the factual circumstances of this case. Nor will the court of appeals' decision create "chaos" within the development community, as broadly asserted by Pyramid and *amici*. That needless destruction of wetlands should be avoided wherever possible is already well-established in the § 404 program, and should surprise no one. The application of that principle in this case is readily comprehensible: when a developer enters a market to build a project, it must consider upland locations for its project during the planning leading up to its selection of a site, and should locate the project in a wetland only if no upland sites are available.

Pyramid also errs in claiming that EPA's decision was inconsistent with prior administrative practice. Precisely because the question raised in this case will occur only under highly unusual factual circumstances, neither EPA nor the Corps have ever had occasion before this case to address the proper time period in which to assess the availability of alternatives to an applicant. To the extent they involved the question of availability of alternatives, the judicial decisions and prior § 404(c) veto proceedings cited by Pyramid all involved circumstances where alternative upland sites were plainly available at the time of application. Pyramid's repeated contention that the Corps and EPA had previously looked to the period of permit application is thus meaningless, for neither agency had previously confronted the timing issue.

Pyramid is equally in error in suggesting, without the slightest support, that the Corps of Engineers disagrees with EPA over this issue. While EPA quite plainly disagreed with the Corps over its decision to grant a permit to Pyramid, that disagreement was over entirely different issues than those raised by the petitioners in this action. Both EPA and the Corps are parties to this action, and have joined in defending EPA's decision on this point. The Justice Department attorney representing the government on appeal stated unequivocally to the court of appeals that he represented the Corps and that the Corps joined fully in the briefs submitted to that court.

The principle that Pyramid would have this Court review is thus a narrow one, addressed to specific and unusual factual circumstances, and developed by EPA quite properly through the

adjudication of the particular case where these circumstances were found to exist. The question Pyramid raises thus falls far short of the significance of the questions presented in cases, such as those cited by Pyramid itself, where this Court has granted review to decide issues central to entire regulatory programs. *See, e.g., Commonwealth of Pennsylvania v. Union Gas Company*, 832 F.2d 1343 (3d Cir. 1987), *cert. granted*, ___U.S.___, 108 S. Ct. 1219 (1988) (*certiorari* granted to determine whether private parties may sue states in federal court to recover cleanup costs under the Superfund law); *Tull v. United States*, ___U.S.___, 107 S. Ct. 1831, 1835 (1987) (*certiorari* granted to resolve conflict among courts of appeals regarding whether a jury trial is required to establish liability and assess penalties for violation of § 404 of the Clean Water Act); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (*certiorari* granted to determine validity of Corps' regulations defining "adjacent wetlands" as "waters of the United States" under the Clean Water Act); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) (*certiorari* granted to review validity of EPA's "bubble concept" under the Clean Air Act). Accordingly, Pyramid's petition does not raise an issue of federal law of sufficient import to warrant review by this Court.

3. The Question Presented by Robichaud *et al.* Plainly Does Not Warrant This Court's Review

The argument presented by petitioners Robichaud *et al.* is of even less consequence than that raised by Pyramid, and was properly rejected by the court of appeals. Robichaud *et al.* contend that EPA erred in taking into consideration the widespread destruction of wetland habitat throughout Massachusetts and the northeastern United States in finding the impacts of Pyramid's proposed mall on wildlife unacceptable. Robichaud *et al.*'s argument is plainly erroneous, and unworthy of this Court's attention. Nothing in the language of § 404(c) so illogically restrains EPA. Indeed, it is difficult to envision how EPA could possibly evaluate the ecological significance of wildlife impacts in order to determine if those impacts are "unacceptable" without considering the context in which those losses take place. To take obvious examples, how could EPA assess the significance of destruction of

specific habitat for a species without considering whether that species is endangered, or otherwise under stress within its range? Similarly, how could EPA assess the relative value of the habitat provided by a particular parcel of wetlands without considering the surrounding area? Fifty acres of swamp might not be significant in the context of Florida's Everglades, but in the increasingly urbanized Northeast it may represent a precious oasis of wildlife habitat, as EPA found here.

The contention of Robichaud *et al.* that EPA must blind itself to every consideration of ecological context in invoking its powers under § 404(c) is thus wholly without merit, and does not deserve this Court's attention.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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No. 88-902 and 88-929

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In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN A. BERSANI, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Administrator of the Environmental Protection Agency abused his discretion in determining, under Section 404(c) of the Clean Water Act, 33 U.S.C. 1344(c), that the development of a shopping mall in a 49.5-acre wetland in Attleboro, Massachusetts, would have an unacceptable adverse effect on wildlife.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (88-902 Pet. App. 1a-29a) is reported at 850 F.2d 36.[1] The opinion of the district court (Pet. App. 32a-63a) is reported at 674 F. Supp. 405. The Final Determination of the Assistant Administrator (Pet. App. 64a-108a) is unreported.

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 88-902.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a) was entered on June 8, 1988. A petition for rehearing was denied on September 2, 1988 (Pet. App. 109a-110a). The petitions for a writ of certiorari were filed on December 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Water Act, 33 U.S.C. 1251 *et seq.*, was enacted in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's Waters" (Sec. 101, 33 U.S.C. 1251). Under Sections 301 and 502 of the Act, 33 U.S.C. 1311 and 1362, any discharge of dredged or fill materials into "navigable waters"—defined to include "waters of the United States"—is forbidden unless authorized by a permit issued by the Secretary of the Army, acting through the Corps of Engineers, pursuant to Section 404, 33 U.S.C. 1344 (1982 & Supp. IV 1986). See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985).

In deciding whether to issue a permit under Section 404, the Corps is governed by guidelines developed jointly by the Secretary and by the Administrator of the Environmental Protection Agency (EPA). 33 U.S.C. 1344(b) (1982 & Supp. IV 1986). Those guidelines provide that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem" (40 C.F.R. 230.10(a)). The guidelines further specify that an alternative is "practicable" if "it is available and capable of being done, after taking into consideration cost, existing technology, and logistics in light of overall project purposes" (40 C.F.R. 230.10(a)(2)). Moreover, an

otherwise available alternative may be considered even if it is "not presently owned by the applicant," provided that such alternative can "reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity" (*ibid.*).

The guidelines also state two presumptions that govern the Corps' evaluation of practicable alternatives. First, where a proposed project will affect a "special aquatic site" (which is defined to include wetlands (see Pet. App. 36a)), but the project does not by its nature require access to such an aquatic site, the guidelines state that "practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise" (40 C.F.R. 230.10(a)(3)). Second, where the project will affect a special aquatic site, "all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise" (*ibid.*).

Section 404(c), 33 U.S.C. 1344(c), authorizes the Administrator of the EPA to veto a permit that otherwise would be issued by the Corps, where the Administrator determines that the proposed discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." An "unacceptable adverse effect" is one that has an "impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water) or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas" (40 C.F.R. 231.2(e)). The Administrator must exercise that "veto" power in accordance with established procedures. See 40 C.F.R. Pt. 231.

2. a. The present case concerns petitioner Pyramid Companies' proposed construction of a shopping mall in certain wetlands, known as "Sweedens Swamp," located in Attleboro, Massachusetts. Sweedens Swamp is a 49.5-acre wetland, which is part of an 80-acre site near Interstate 95. It is undisputed that Pyramid's proposed shopping center would involve the discharge of dredged or fill materials into "waters of the United States," thereby requiring a permit under Section 404 of the Clean Water Act. Pet. App. 3a, 6a, 9a.

Some time prior to April 1982, Pyramid's predecessor, the Edward J. DeBartolo Corporation, purchased the swamp. At that time, there was a second, non-wetland site available, only three miles away in North Attleboro, Massachusetts, that could also have accommodated the proposed shopping mall. On July 1, 1983, however, the New England Development Company, a competitor of Pyramid, began to purchase options to buy the North Attleboro site. Thereafter, in December 1983, Pyramid purchased Sweedens Swamp from DeBartolo. Pet. App. 9a-11a, 40a.

In August 1984, Pyramid applied to the New England regional division of the Corps for a permit to discharge into Sweedens Swamp.[2] It sought to fill or alter 32 of the 49.5 acres of the swamp; to excavate nine acres of uplands in an attempt to create artificial wetlands; and to alter 13.3

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[2] Because Massachusetts requires state approval for projects that would fill wetlands, DeBartolo had previously applied to the Massachusetts Department of Environmental Quality Engineering (DEQE) for permission to build on Sweedens Swamp. DEQE initially denied the application. Thereafter, in March 1985, DEQE granted approval to Pyramid for the project, based on an application of regulations that were in effect when DeBartolo had applied. That determination was eventually upheld by the Massachusetts Supreme Judicial Court. Pet. App. 9a-10a.

acres of existing wetlands to improve its environmental quality. Some time later, Pyramid proposed to mitigate the adverse impact on the wetlands by attempting to create 36 acres of replacement wetlands in an off-site gravel pit. Pet. App. 11a.

In connection with its application for a permit, Pyramid submitted information concerning "practicable alternatives" to the Sweedens Swamp site, including the North Attleboro site. In rejecting the latter site as an alternative, Pyramid contended that it " 'lacked sufficient traffic volume and sufficient access from local roads' "; that " 'potential department store tenants had expressed strong doubts about the feasibility of the site' "; and that " 'previous attempts to develop the site had met with strong resistance from the surrounding community.' " Pet. App. 11a-12a (emphasis omitted).

On May 2, 1985, after receiving comments from EPA that were critical of the proposed construction, the Corps' regional division recommended to national headquarters that the permit to construct the mall be denied. General John F. Wall, the Director of Civil Works at the national headquarters, disagreed. He found that Pyramid's proposal to create an off-site artificial wetland sufficiently mitigated the adverse environmental effects of the project. He also determined that the North Attleboro site was unavailable as an alternative because it had been "optioned by another developer." On June 28, 1985, pursuant to Wall's directive, the Corps sent Pyramid a notice of its intent to grant the permit. Pet. App. 12a-13a.

b. EPA thereafter initiated a review of the Corps' decision under Section 404(c). On May 13, 1986, the agency determined that a permit should not be issued (Pet. App. 64a-108a). The agency first found that Sweedens Swamp "provides many wetland values such as wildlife habitat,

food chain production, natural flood storage, groundwater discharge, and water quality renovation" (*id.* at 76a). "Construction of a large shopping center at Sweedens Swamp," the agency explained, "would drastically change the hydrology, soils, and biology of the area" (*ibid.*). In particular, the agency found that the proposed project would eliminate or alter a substantial part of the wildlife habitat in the swamp, including "species of birds, small mammals, and amphibians, that are typical of New England forested swamps" (*id.* at 77a). The agency therefore concluded that the mall project "would have adverse impacts on wildlife values protected by section 404(c)" of the Clean Water Act (*id.* at 83a).

The agency next addressed the question whether the adverse effects of the mall project were "unacceptable," explaining that that question turned, in part, on whether there were less drastic alternatives available. The agency found that the North Attleboro site was a "practicable alternative" to Sweedens Swamp (Pet. App. 86a-105a). It determined that the North Attleboro site was feasible, noting that New England Development was pursuing a similar project on that site (*id.* at 88a). The agency also concluded that the North Attleboro site was "available." In reaching that conclusion, EPA examined the period during which the company was investigating the trade area and before it selected Sweedens Swamp (when it "entered the market" (Pet. App. 95a)), as well as the period between Pyramid's purchase of Sweedens Swamp in December 1983 and the submission of its permit application in July 1984. The agency observed that the guidelines under Section 404(b) "were intended to avoid unnecessary filling of wetlands and to require a prospective discharger to take a hard look *before* concluding that upland sites are not available" (*id.* at 92a (emphasis in the original)). Ac-

cordingly, the agency reasoned, "[i]t is both fair and consistent with the Guidelines to review the period of availability as including the period when the developer is selecting a site for its project" (*id.* at 93a). EPA found that the record clearly showed that "Pyramid and New England Development were exploring the same trade area at approximately the same time and that Pyramid decided against the North Attleboro site solely on the basis of unsuitability" (*id.* at 95a). The agency also explained that "[t]he uncontested fact is that Pyramid never checked the availability of the North Attleboro site during its investigation of the market, notwithstanding its knowledge that Sweedens Swamp suffered from significant environmental constraints. Pyramid rejected the site not because it was unavailable but because Pyramid believed it was not an economically viable site." *Id.* at 94a. The agency concluded that Pyramid had not "met its burden of showing that the North Attleboro site was unavailable" (*id.* at 95a-96a).[3]

Finally, the agency concluded that "locating a shopping mall at the North Attleboro site would have less adverse impact on the aquatic ecosystem" (Pet. App. 98a). Among other things, the agency noted, "the North Attleboro site has less than one acre total wetlands, scattered in small pieces, compared to the 32 acres to be filled at Sweedens Swamp" (*ibid.*). The agency also rejected as insufficient Pyramid's proposal to mitigate the adverse impact of its project by creating a wetland complex out of a mostly

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[3] EPA also noted that since New England Development had not acquired all its options on the North Attleboro site until July 1984, the site may have remained available to Pyramid throughout that period. In addition, the agency found that because of "[t]he special circumstances of this case," any alternative that had been available to Pyramid's predecessor should likewise be regarded as an alternative available to Pyramid. Pet. App. 95a-97a.

upland gravel pit. It found that the proposal "presents substantial risks and uncertainties" (*id.* at 101a), and that "even if successful," the proposal "would not provide the same kind of habitat as that which would be lost at Sweedens Swamp" (*id.* at 103a-104a).

3. Petitioners thereafter brought an action in the United States District Court for the Northern District of New York, challenging EPA's decision as arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. 704, 706. On cross-motions for summary judgment, the district court ruled for respondents (Pet. App. 32a-63a). The court first found (*id.* at 47a-55a) that in deciding whether the proposed use of the wetlands would have an "unacceptable adverse effect," the agency was entitled "to take into account the existence of a 'practicable alternative' " (*id.* at 48a). Turning to the merits, the court upheld EPA's finding that the North Attleboro site constituted a practicable alternative to Sweedens Swamp. The court agreed that the North Attleboro site was both feasible (*id.* at 55a-57a) and available to Pyramid (*id.* at 57a-59a), and it rejected petitioners' contention that a site may be found to be "available" under 40 C.F.R. 230.10(a) only if it is available to the developer at the time that the agency acts on the developer's permit application. The court found, instead "that the record supports the EPA's finding that the North Attleboro site was available to Pyramid at the time it 'entered the market' in September or December of 1983" (*id.* at 60a).[4]

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[4] The district court also held that "[e]ven assuming that the EPA reached an arbitrary decision regarding the availability of a practicable alternative, its Final Determination must be upheld as reasonable because it was based upon a rational, independent finding that a significant loss in wildlife would result from the construction of a mall at Sweden's [*sic*] Swamp" (Pet. App. 61a).

4. The court of appeals affirmed by a divided vote (Pet. App. 1a-29a). The court first held that EPA's construction of the governing regulations—according to which the availability of the North Attleboro alternative should be judged as of the time that Pyramid entered the market for a construction site—was reasonable in these specific circumstances. The court explained that although the language of 40 C.F.R. 230.10(a)(2) is phrased in the present tense, " 'the regulations do not indicate *when* it is to be determined whether an alternative "is" available,' i.e., the 'present' of the regulations might be the time the application is submitted; the time it is reviewed; or any number of other times" (Pet. App. 16a (emphasis in the original)). Moreover, the court noted that the purpose of the regulations "is to create an incentive for developers to avoid choosing wetlands when they could choose an alternative upland site" (*ibid.*); petitioners' reading of the regulations, the court stated, "would thwart this purpose because it would remove the incentive for a developer to search for an alternative site at the time such an incentive is needed, i.e., at the time it is making the decision to select a particular site" (*id.* at 16a-17a). "If the practicable alternatives analysis were applied to the time of the application for a permit," the court explained (*id.* at 17a), "the developer would have little incentive to search for alternatives, especially if it were confident that alternatives soon would disappear."[5]

Judge Pratt dissented (Pet. App. 25a-29a). In his view, the market entry analysis improperly "focus[es] on the decisionmaking techniques and tactics of a particular developer" (*id.* at 26a) and "inject[s] exquisite vagueness"

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[5] The court also held that EPA's "market entry" approach to the regulations was not in conflict with prior practice (Pet. App. 17a-19a), and that it was neither excessively vague nor unfair (*id.* at 22a-24a).

into the determination of whether a particular site is an "available" alternative (*id.* at 27a). Judge Pratt concluded that the availability of a site should instead be based on "the circumstances which exist at the time [EPA] makes its decision" (*id.* at 28a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, petitioners' challenge to the EPA's decision arises principally from the unusual facts of this case: that by the time Pyramid submitted its application for a permit, a competitor had begun purchasing options to an otherwise available upland site, thereby making it arguably unavailable to Pyramid. The agency's fact-bound determination, upheld by both the district court and the court of appeals, warrants no further review.

1. Petitioners first contend (88-902 Pet. 13-18) that the "market entry" formulation "provid[es] no guidance to the regulated community of the standard to which it will be held" (*id.* at 13), because EPA has "refused to specify the point in time at which the availability inquiry begins" (*id.* at 14). Petitioners assert that governmental planning agencies, in particular, "are always in the market" (*id.* at 15). In petitioners' view, the EPA's standard is imprecise and they contend that as a result "[l]ocal, state and regional planning efforts will be undermined" (*id.* at 17).

The question when, precisely, a developer is "in the market" for purposes of the "market entry" standard is simply not presented in this case. As the agency found—in a finding that petitioners do not dispute—"[t]he uncontested fact is that Pyramid never checked the availability of the North Attleboro site during its investigation of

the market, notwithstanding its knowledge that Sweedens Swamp suffered from significant environmental constraints" (Pet. App. 94a). Indeed, the agency noted (*ibid.* (citation omitted)), "Pyramid rejected the site not because it was unavailable but because Pyramid believed it was not an economically viable site. Pyramid stated that it would have turned down the site for its project even if it were offered 'for free.' " In short, Pyramid never considered the North Attleboro site at all, regardless of when Pyramid was in the market or the site was available. The EPA accordingly had no occasion in this case to resolve the precise moment at which a developer may be said to be "in the market," for purposes of determining the availability of competing alternatives.

2. Petitioners next contend (88-902 Pet. 18-25) that EPA's market entry standard is inconsistent with the purpose of Section 404 of the Clean Water Act, because it does not require "an objective inquiry into the impacts on the physical environment that would result from the choice of one site over another" (*id.* at 20). In petitioners' view, EPA's analysis "disregards the environmental impacts on the land in question" and thereby "fail[s] to protect the wetland" (*ibid.*).

As the court of appeals explained, however, EPA's application of the regulations in this case is entirely faithful to the purposes of the Clean Water Act. The Act is designed, in principal part, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. 1251). By focusing on the period during which a developer is considering its options, and has not yet committed its resources to a particular wetland site, the market entry standard "create[s] an incentive for developers to avoid choosing wetlands when they could choose an alternative upland site" (Pet. App. 16a). By con-

trast, "[i]f the practicable alternatives analysis were applied to the time of the application for a permit, the developer would have little incentive to search for alternatives, especially if it were confident that alternatives would soon disappear" (*id.* at 17a).

Petitioners assert (88-902 Pet. 20), however, that the market entry approach "leads inevitably to consideration of factors far different from those contemplated by Congress." For example, in this case, petitioners argue, the agency inappropriately requested records reflecting the developer's efforts to pursue upland alternatives. Petitioners apparently believe (see *id.* at 21, 23-24) that the EPA may evaluate only the environmental impact of a project, and may not consider whether there are alternatives available to the developer. There is no basis for that contention. Section 404(c) of the Act, 33 U.S.C. 1344(c), expressly requires the agency to determine whether the proposed project "will have an unacceptable adverse effect." As the district court observed (Pet. App. 48a), Section 404(c) does not preclude the EPA, in determining whether an "adverse effect" is "unacceptable," from considering whether less "adverse" alternatives were available. Indeed, the regulations promulgated under Section 404(c) state that the Administrator should consider the "relevant portion of the [404(b)] guidelines" in making his Section 404(c) unacceptability determination; the Section 404(b) guidelines expressly require a consideration of practicable alternatives. See 40 C.F.R. 231.2(e); Pet. App. 6a-7a & n.2, 48a.

3. Petitioners also contend, in passing (88-902 Pet. 25-27), that evaluating alternatives at the time of market entry is inconsistent with the language of the pertinent regulations. The court of appeals correctly rejected that claim. Although the regulations are phrased "in the pres-

ent tense" (88-902 Pet. 25), they do not specify the point in time at which an alternative must be "available" in order to constitute a "practicable alternative." The court of appeals was therefore correct in concluding that "when the agencies drafted the language in question they simply were not thinking of the specific issues raised by the instant case, in which an applicant had available alternatives at the time it was selecting its site but these alternatives had evaporated by the time it applied for a permit" (Pet. App. 16a). Because the text does not resolve the issue, the court correctly looked to the *purpose* of the regulations—"to create an incentive for developers to avoid choosing wetlands when they could choose an alternative upland site" (*ibid.*)—and held that EPA's interpretation of the regulations comports with that governing purpose.

4. In the court of appeals, petitioners also contended that the analysis of alternatives at the time of market entry is inconsistent with the past regulatory practices of both the Corps and the EPA (Pet. App. 17a-19a). The Second Circuit rejected that contention, finding that the issue was one of first impression (*id.* at 19a). Petitioners do not renew that claim, apparently recognizing that there is no conflict among the lower courts over the market entry analysis. They assert, however, that the issue is sufficiently important to warrant this Court's review. But, as the Second Circuit observed, EPA had employed its Section 404(c) authority only five times since the enactment of that provision. During that same time, the Corps has processed an average of 11,000 permit applications annually. Pet. App. 9a.

Moreover, petitioners' present challenge to the market entry approach contradicts the position they took at an earlier stage in these proceedings. When petitioners submitted their supplemental permit application to the Corps in October 1984, they argued that the appropriate time for

assessing practicable alternatives was when the applicant was exercising its business judgment. Pet. App. 93a. As petitioners put it at the time, "To avoid this 'second guessing' of reasonable business judgments, the regulating agency's reference point must be the point in time when the proponent analyzed its alternatives." C.A. App. 372. That is the very time frame that the EPA analyzed, and that petitioners now repudiate.

5. Finally, petitioners contend (88-929 Pet. 6-12) that the EPA exceeded its statutory jurisdiction under Section 404(c) when, in making its decision, it considered the environmental consequences of the proposed shopping mall for other parts of Massachusetts, in addition to the impact on Sweedens Swamp. That claim is meritless. Section 404(c) authorizes the Administrator of EPA to prohibit a proposed discharge when he finds that it "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas" (33 U.S.C. 1344(c)). By its terms, Section 404(c) does not limit the regions that the Administrator may take into account in making his determination, and it certainly does not require him to consider only the effect on the particular wetland site. Indeed, because a significant change in the environmental quality of a particular wetland is likely to affect the quality of surrounding regions (see Pet. App. 77a, 79a), it would not be sensible to construe Section 404(c) as narrowly as petitioners propose.[6]

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[6] Petitioners base their contrary reading of Section 404(c) on the fact that the provision authorizes the Administrator to prohibit discharge into a "defined area' whenever he determines that the requested discharge into "such area" will have an unacceptable adverse effect (88-929 Pet. 7-8). The quoted language provides simply that the Administrator must determine whether to permit discharge into a

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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specific area; it does not provide that, in making that determination, he is forbidden to consider the environmental impact on surrounding areas.

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No. 88-902

IN THE

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OCTOBER TERM, 1988

JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL and the PYRAMID COMPANIES,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et. al.*,
Respondents.

REPLY BRIEF OF PETITIONERS

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ERRATA

The cite to the Clean Water Act in the Table of Authorities should read: Clean Water Act § 404, 33 U.S.C. § 1344

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Respondents.

REPLY BRIEF OF PETITIONERS

Petitioners ("Pyramid") offer the following points in reply to the Brief for the Federal Respondents in Opposition ("Govt. Br.").

This case raises an issue of fundamental importance to the administration of the Section 404 program. If this Petition merely involved a "fact bound" determination affecting only one developer, Govt. Br. at 10, thirteen *amici* representing diverse interests not ordinarily aligned together would not be urging the Court to hear it. Likewise, thirteen opposing organizations would not be standing like Horatio at the bridge attempting to shield the decision from review. Plainly, all sides understand the sweeping precedential effect of the Second Circuit's opinion.

That decision both works a radical change in the "test" applied by the Corps of Engineers to all 404 permit applicants[1] and hands EPA far broader authority than Congress ever intended. The Second Circuit not only found EPA's "market entry" theory to be reasonable, it held that the theory was the *only* method for determining the availability of alternatives under the practicable alternatives requirement.[2] Pet. App. 17a. Furthermore, the court refused Pyramid's entreaties to require the Agency to define market entry, asserting that "it would confuse things further to attempt to do so." *Id.* at 22a. As a consequence, no one knows when a party "enters the market," and EPA is free to change the date with each new case.

"Market entry" is the key issue in this case. It is remarkable that after three years of litigation in which "market entry" has been the central issue, the Government now claims that "the 'market entry' standard is simply not presented in this case." Govt. Br. at 10. According to the Government, EPA's

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[1]The Government's suggestion that the decision is of no moment because "EPA ha[s] employed its Section 404(c) authority only five times," Govt. Br. at 13, is wrong on two counts: first, the practicable alternatives test which is substantially altered by this decision is applied in every permitting decision (approximately 14,000 per year) not merely in Section 404(c) veto actions; and second, EPA has stepped up its use of Section 404(c) since the decision in this case. In February 1989 alone, for example, EPA Region I initiated veto proceedings against a state-sponsored water reservoir project in Rhode Island, 54 Fed. Reg. 5133 (Feb. 1, 1989), and two weeks later, headquarters published a Final Determination vetoing another project in Georgia, 54 Fed. Reg. 6749 (Feb. 15, 1989).

[2]Since the Second Circuit opinion was not based on deference to EPA, Pet. App. 20a, the Government has misstated the "Question Presented." This is not a simple abuse-of-discretion case, but one which tests whether EPA's "market entry" theory violates the language and purpose of the statute and regulations and offends fundamental principles of administrative law.

decision in this case turned on "the uncontested fact . . . that Pyramid never checked the availability of the North Attleboro site." Govt. Br. at 10. But the consequence of not checking is not permit denial, Pet. App. 92a-95a, and EPA did not veto this permit because Pyramid failed to check. It vetoed the permit because, according to the Government, North Attleboro was available when Pyramid "entered the market." Pet. App. 92a-95a. Clearly, the act that constituted market entry and when it occurred are critical to the EPA and court decisions in this case.

If Pyramid did not "check" in a manner that would have suited EPA's fancy, this was because Pyramid judged the site to be infeasible[3] and knew that it was controlled by a competing mall developer. Moreover, under the regulatory interpretation espoused by both the Corps and EPA regional offices at the time Pyramid purchased South Attleboro, "checking" would have done it no good.

Initially, both regional offices believed that, under the practicable alternatives test, an alternative would be deemed "available" to the applicant if it was available to anyone. *See* J.A. 156-159, AR B-101, H-92. Since Pyramid knew that New England Development had already acquired controlling options on North Attleboro intending to develop a shopping mall, it knew the Corps considered the site available to Pyramid as a matter of law, even though it was not available in fact. Therefore, Pyramid's permit application focused primarily on establishing the infeasibility of North Attleboro and dealt with the site's nonavailability only in passing.

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[3]The regulations forbid permit issuance if the applicant has a "practicable alternative." An alternative must be both "feasible" and "available" to be deemed "practicable." If an alternative is either infeasible or unavailable, it cannot be practicable. 40 C.F.R. § 230.10(a).

EPA headquarters, in reviewing this case, ultimately corrected the Region's legal error concerning availability, recognizing that a site is "unavailable" if it is not available to the applicant. Pet. App. 92a. The Government now seeks to have its own errors held against Pyramid, bringing Pyramid's conduct rather than the actual availability of an alternative site into question.

Pyramid never advocated a market entry theory of availability. The Government's arguments that it did are, charitably, disingenuous. As the Government knows full well, and, indeed, acknowledged in its brief below, the statement it cites from Pyramid's permit application referred only to the feasibility of an alternative, not the availability.[4] The "feasibility" inquiry is separate from the "availability" inquiry, and there is no reason the two must be judged at the same point in time.[5] If the Government means to suggest that feasibility and availability must be judged in the same time frame,[6] then the Government itself is inconsistent, for the Corps and EPA rejected Pyramid's argument on the timing of the feasibility analysis. They applied a present-tense analysis of feasibility, and judged feasibility on the basis of conditions existing as of the date of the permit decision, but judged availability as of "market entry."

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[4]Pyramid's application addressed the "availability" prong of the practicable alternatives test in a separate section and did not discuss the timing question that is the focus of this litigation.

[5]Feasibility is a judgment call and, thus, Pyramid argued that the Corps should look at feasibility as of the time and in the circumstances in which the applicant had to make its judgment. The same is not true of availability, which is a simple factual question — *i.e.*, is a site available or not?

[6]If the two must be judged in the same time frame, then "the most natural reading" is the time of application, since the regulation is written in the present tense and is intended to be applied by the permitting authority in deciding on applications. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, ____ U.S. ____, 108 S.Ct. 376, 381 (1987).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PARKS, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, AMERICAN RESORT & RESIDENTIAL DEVELOPMENT ASSOCIATION AND NATIONAL REALTY COMMITTEE MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF IN SUPPORT OF THE PETITION

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IN THE

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MOTION OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PARKS, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, AMERICAN RESORT & RESIDENTIAL DEVELOPMENT ASSOCIATION AND NATIONAL REALTY COMMITTEE FOR LEAVE TO FILE THE ATTACHED BRIEF *AMICI CURIAE*

The above named trade associations respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of Petitioners.

The Associations have received written consent from petitioners, respondent United States and intervenor-appellants below, Joseph Robichaud and Citizens in Sup-

port of Attleboro Mall,[1] to file the brief and have filed their letters of consent with the Clerk of the Court. Intervenor-appellees below, environmental groups listed in the Certificate of Service filed with the Clerk, have declined to grant consent.

The National Association of Home Builders (NAHB) represents 155,000 builders and associate members organized in approximately 800 affiliated state and local associations in all fifty states, the District of Columbia and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land planners, land developers and remodelers. It is the voice of the American shelter industry.

The National Association of Industrial and Office Parks (NAIOP) is a professional organization of more than 7,000 individuals engaged in owning, managing and developing office and industrial buildings in the United States and internationally. Its members include not only the nation's leading commercial real estate developers but also architects, brokers, master planners, engineers, property managers, banks, insurance companies and other real estate financial groups.

The International Council of Shopping Centers (ICSC) is the trade association of the shopping center industry. Members of the ICSC, consisting of shopping center developers, retailers, investors, managers and others having a professional or business interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. ICSC has approximately 27,000 members, and

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[1] The intervenor-appellants below have also filed a petition for writ of certiorari with this Court to review the Second Circuit's opinion. *Joseph Robichaud and Citizens in Support of Attleboro Mall v. United States Environmental Protection Agency, et al.*, 88-929. They raise a separate statutory construction issue not addressed by the petitioners, Bersani, et al., or these *amici*.

the approximately 25,000 located in the United States represent a majority of the shopping centers in this country. The ICSC is the only United States trade association specific to shopping centers.

The American Resort & Residential Development Association (ARRDA) is a trade association whose members consist of developers, operators and owners of resort and residential communities located throughout the United States. Firms that belong to ARRDA also include vacation exchange companies, lenders, consultants, attorneys and accountants who provide services to members and consumers. Each year, ARRDA's members, which include corporate and individually owned large and small businesses, serve millions of consumers in the United States and abroad by providing the varied leisure opportunities that families and individuals want and need in today's society.

The National Realty Committee (NRC) represents the nation's leading developers, owners and financiers of income-producing real property. Its members include individuals and firms that design, plan, develop, lease, own, operate and finance income-producing real property, including office buildings, shopping centers, industrial buildings, warehouses and apartment buildings.

The members of these *amici* compete with one another within and among the five associations, vary in their operations and are highly diverse. They range from the small residential builder that may need to purchase only one tract of land per year to construct a few homes to the large, well capitalized company that can acquire and work on multiple tracts of land. They construct shelter for people in all walks of life, as well as the schools, churches, shopping centers, office buildings and other structures that are so vital to our communities.

These people and businesses are intimately involved in the federal government's wetlands protection program embodied in the Clean Water Act, 33 U.S.C. §1251, et seq. (1982), popularly known as the §404 program, and the implementation of the program's permitting guidelines, 40

C.F.R. §§ 230.1-230.80 (1987)(known as the §404(b)(1) guidelines). Since much land is affected by the §404 program, often they can not function without obtaining permits, which are authorized under §404, to place dredge or fill material into the "waters of the United States" or associated wetlands that come within the Clean Water Act's jurisdiction.

In applying its "practicable alternatives" analysis within the framework of the §404(b)(1) guidelines, the EPA's new "market entry" theory significantly and adversely impacts the land acquisition and finance processes in which these people and businesses routinely engage. Within this community of property owners, entrepreneurs and investors, EPA's unexpected market entry policy, which is nowhere found in any regulatory language, has caused a vast amount of confusion nationwide as to how to proceed with project ideas. The Second Circuit's confirmation of this new policy has engendered widespread dismay because of the opinion's complete lack of recognition, and even express rejection, of basic and real world project planning, land acquisition and finance principles.

These *amici* sincerely believe that the accompanying brief will greatly assist the Court because our concerns are much broader than those of petitioners. Petitioners focus their arguments on the illegality of EPA's market entry theory and the circumstances of their case, as important as it is. Our brief addresses public policy and land development issues not analyzed by petitioners, and relates those issues to the impracticality of EPA's new theory.

The protection of valuable wetlands is a laudable goal. But as with any other societal desire, its method of achievement should be informed, sound and rational. "Probably the biggest challenge facing the country is to make [wetlands protection] programs more effective while reducing the costs, delays, uncertainties, and frustrations they impose on wetlands owners, regulators and the many types of users." The Conservation Foundation, Protecting America's Wetlands: An Action Agenda, The Final Report of the National Wetlands Policy Forum 35 (1988). "Indeed,

the 'saga of Sweedens Swamp' heightened rather than resolved the very difficult issue of how we strike a reasonable balance between private land development interests and the admitted need to prevent unnecessary destruction of our valuable wetland resources." Liebesman, The 'Sweedens Swamp' Controversy - Focusing on EPA's Role in the Clean Water Act §404 Program, 9 Nat'l Wetlands Newsletter 15, 17 (Nov.-Dec. 1987)(Mr. Liebesman was lead federal counsel in the District Court below, *Bersani v. Environmental Protection Agency*, 674 F. Supp. 405 (N.D.N.Y. 1987).

The Clean Water Act balances the need to protect the quality of waters of the United States with society's need for economic growth and development. This Court has noted that where other values outweigh wetland values a permit can be issued. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 n.9 (1985). The United States Army Corps of Engineers recognizes that "[t]he economic benefits of many projects [which require a §404 permit] are important to the local community and contribute to needed improvements in the local economic base, affecting such factors as employment, tax revenues, community cohesion, community services, and property values." 33 C.F.R. §320.4(q)(1987). But the EPA has relinquished any sense of duty to this crucial and difficult balancing test and the Second Circuit has failed to use its corrective powers, to the detriment of the members of these *amici* and of the whole nation.

For the above reasons, this Motion should be granted.

Respectfully submitted,

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Petitioners,

v.

United States Environmental Protection Agency, *et al.*,
Respondents.

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PARKS, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, AMERICAN RESORT & RESIDENTIAL DEVELOPMENT ASSOCIATION AND NATIONAL REALTY COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

INTEREST OF THE AMICI CURIAE

The interest of *amici curiae* is set forth in the preceding motion for leave to file this brief.

STATEMENT OF THE CASE

A. Wetland Boundaries And The Section 404 Process

These *amici* adopt the Statement of the Case in the petition filed by Bersani, et al. However, to fully comprehend the mass confusion and unpredictability caused by EPA's new market entry theory and the Second Circuit's "rationale" supporting EPA, it is important to go beyond

the alternatives analysis and understand the practical application of the §404 program. These related §404 program issues, which the regulated community faces on a daily basis, highlight why the market entry theory is arbitrary, unreasonable and impracticable.

In the *Bersani* case, the alternative site wrongly identified by the EPA as available to and feasible for Pyramid Companies, the North Attleboro site, was clearly upland. *Bersani v. Robichaud*, 850 F.2d 36, 41 (2d Cir. 1988). This situation is an anomaly. In most cases, a property owner does not know if a particular site or potential alternative sites have wetlands or, if there are obvious wetlands, what the upland limits of any wetlands may be. See *National Wildlife Federation v. Hanson*, 623 F.Supp. 1539, 1546 (E.D.N.C. 1985); Pet. for Cert. at 16; Accord, Parrish & Morgan, *History, Practice and Emerging Problems of Wetlands Regulation: Reconsidering Section 404 of the Clean Water Act*, 17 Land & Water L. Rev. 43, 46-47, 59-60 (1982).

If property owners suspect that there are covered wetlands on a site, they must hire a wetland scientist to perform a wetland boundary study and submit this data to the Corps and possibly the EPA for a formal jurisdictional determination. A jurisdictional determination is the process by which the federal government determines the actual boundary of the wetlands or waters of the United States covered by their regulatory jurisdiction. However, the Corps and EPA have failed to articulate a uniform method by which a property owner can know whether its property contains covered wetlands. The Corps and EPA have agreed on a "definition" of wetlands,[1] but that definition leaves so many questions unanswered that it does not much advance matters in terms of providing an individual a useful and knowable guide to the conduct of its

[1] Wetlands consist of "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. §328.3(b) (1987); 40 C.F.R. §230.41(a)(1) (1987).

affairs. For example, the regulatory "definition" does not define key terms such as "inundated or saturated," "frequency and duration," "normal circumstances" and "prevalence of vegetation." Even EPA recognizes the extreme difficulty of discerning a wetland, stating that the margins of wetlands "can best be established by specialists." 40 C.F.R. §230.41(a)(2)(1987).

The property owner's uncertainty only begins with the definition. The National Wetlands Policy Forum stated:

> Another source of inconsistency is the difficulty of applying a wetlands definition to an on-the-ground determination of a regulatory boundary. . . . Different individuals or agencies may also use different boundary delineation methodologies, even with the same definition, and in some cases they may apply the same delineation methodology differently.

The Conservation Foundation, Protecting America's Wetlands: An Action Agenda, The Final Report of the National Wetlands Policy Forum 37 (1988). This is precisely the problem with the Corps' and EPA's implementation of the §404 program. They have not agreed on a test method for determining the existence and extent of wetlands despite the fact that they use the same regulatory definition. A recent study by the General Accounting Office characterizes the differences in the delineation methods of the Corps, EPA and other agencies as "fundamental" and further notes that the different approaches "can result in wetlands determinations that vary by thousands of acres" for the same area.[2] After a property owner receives a jurisdictional determination or otherwise knows with assurance that the property is covered by the Clean Water

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[2] United States General Accounting Office, WETLANDS, The Corps of Engineers' Administration of the Section 404 Program, Report to the Chairman, Subcomm. on Investigations and Oversight, Comm. on Public Works and Transportation, House of Representatives (Washington, D.C.: GAO/RCED-88-110, July, 1988) at 23, 33.

Act ("CWA"), 33 U,S.C. §§1251 *et seq.* (1982), the property owner must then apply for a §404 permit.

B. Project Planning, Land Acquisition And Real Estate Finance Practices

A basic understanding of project planning, land acquisition and real estate finance practices is required to comprehend the mass confusion created within the diverse community of potential §404 applicants by EPA's new market entry theory. These practices are required of the regulated community by lenders and other project investors as well as the pressures of free market forces and competition.

The project planning, land acquisition and finance process is complex and risky. Although the "industry" that these *amici* represent is comprised of diverse businesses that operate in distinctly varied economic and market settings, every member shares the need for reasonable predictability. Predictability is the key to profitability. The ability to accurately assess all of the economic and market forces as well as the applicability and effect of regulations that dictate project planning and design separates the successful and profitable enterprise from the unsuccessful.

1. Preliminary Steps

Potential §404 applicants do not use a single process for planning projects, acquiring land and financing these activities. However, some generalized stages of these processes can be outlined.

As a first step, many potential §404 applicants conduct a market study. Market research and analysis provide a framework that helps determine the anticipated absorption of the applicant's product. "The absorption period refers to the amount of time it will take to sell out or lease up a real estate project." NAHB, Land Development 26 (1987) (hereinafter cited as Land Development). Conducting market studies *before project planning* is necessary to maximize the opportunities to increase site-specific absorption, otherwise known as market capture. This market capture

occurs only "when a project is designed specifically for its given marketplace," *Id.* at 17, which necessarily cuts down on potential locations where the specific product can be placed.

Market research identifies the characteristics of various products already on the market, characteristics of the local population, economic forces and consumer information, and is also used to conduct a competitive audit that will yield information on what competitors in the market place are or will be doing. The project proponent will use this analysis of the market to narrow down the geographic area where the project can be placed.

Once a business identifies a market that it believes it can capture, it can then proceed to the next stage in the planning process and evaluate project feasibility. The feasibility analysis determines whether threshold conditions can be met and the cost of meeting those conditions. Considerations here include the availability of infrastructure needed to support the project, comparability of the existing and prospective zoning and other ordinances with possible plans, site and project relationship to existing neighborhoods, land improvement time and site sensitive features (e.g., drainage, soils, stability problems, topography requiring extensive earth moving and obvious wetlands) that can be mapped from available data such as tax maps, zoning maps and United States Geological Survey and Soil Conservation Service maps. *Id.* at 30-39. This information leads to the creation of a schematic plan (not a site plan) that determines lot yields, profitability and a decision on whether to proceed further with planning.

Everything up to this point must be done with discretion. The premature disclosure of plans for a project may either alarm surrounding landowners before an opportunity arises to present the project's advantages, or it may raise surrounding land prices high enough to prohibit purchase. *Id.* at 32-33. It would also inform competitors, who may be conducting similar efforts to meet the same market demand, of the potential applicant's plans. The objective

at this point is to determine whether a potential site is feasible enough to warrant further, detailed investigation of a site and the preparation of a site plan.

2. Site Analysis

The project planning process begins long before a potential §404 applicant can evaluate the applicability of the §404(b)(1) guidelines. Frequently the potential applicant considers more than one site during the feasibility analysis. However, the possible future applicant will not have prepared any plans in sufficient detail to determine precisely where land grading and other work will occur and thus whether jurisdictional wetlands, if any, will need to be touched.

Only after a feasibility analysis determines that a site is reasonably compatible with a proposed project and the possible applicant has a general idea of the site, does a project planner initiate a detailed site analysis. *Id.* at 39. This is the stage where natural and man-made environmental conditions on or affecting the site are examined. As much information as possible must be gathered before approaching the owner or a real estate agent to avoid premature disclosure of plans, but if all information obtained warrants further action acquisition plans may need to be revealed.

At this point the site may have to be controlled, by obtaining an option to purchase or some other method, to conduct the necessary detailed engineering and on-site analyses, including an accurate determination of wetland boundaries, required to produce a functionally, environmentally and socially appropriate physical site plan. Also, "[a]n option permits the latitude to secure the necessary zoning and other approvals." *Id.* at 97. See NAHB, Financing Land Acquisition and Development 57-58 (1987) (hereinafter cited as Financing Land Acquisition); R. Lewis, Land Buying Checklist viii (3rd ed. 1988). It is at this stage where the project proponent conducts the planning process at the level of detail needed to evaluate the applicability of the §404(b)(1) requirements.

3. Project Financing

Once all of these studies have been completed, the project proponent must still be willing to incur the substantial risk involved in proceeding with its project. If the decision is made to proceed, all the data must be submitted in appropriate form to lenders, joint venture partners or other investors. These people and institutions need assurance that the project is physically and financially viable. They often require an independent market analysis that provides an objective third-party opinion of the project's feasibility. It can be extremely difficult to obtain financing for land acquisition and development because of the high degree of risk. A loan application must be put together that meets the project's financial needs and is attractive to lenders. Financing Land Acquisition, *supra* at 59; Land Development, *supra* at 99.

4. Market Entry

This general outline of project planning, land acquisition and finance practices is a very simplified model. In most situations, it will be impossible to define a precise point in time when a project proponent enters a market. In discussing the questions left unanswered by EPA's market entry theory and this case, the lead federal counsel in the District Court, *Bersani v. EPA*, 674 F. Supp. 405 (N.D.N.Y. 1987), noted that "[m]any projects go through extensive changes in purpose, size, design, and location. It may be quite difficult to define the purpose of a project which may have gone through many changes. Similarly, the complex nature of land transactions makes it very difficult to know what is an alternative site and when it can be acquired." Liebesman, The 'Sweedens Swamp' Controversy - Focusing on EPA's Role in the Clean Water Act §404 Program, 9 Nat'l Wetlands Newsletter 15, 17 (Nov.-Dec. 1987).

Even the simplified model above does not apply to many potential §404 applicants. Some potential applicants have owned land since before promulgation of the final §404(b)(1) guidelines in 1980, 45 F.R. 85,335 - 57 (Dec. 24, 1980), or even before enactment of the Federal Water Pollution

Control Act in 1972, Pub. L. No. 92-500, 86 Stat. 816,884 (1972) (codified as amended at 33 U.S.C. §§1251 *et seq.* (1982). Also, most applicants, who are entrepreneurs properly functioning in our free enterprise system, are always in the market for project sites and have not left the market since the creation of their businesses.

Some potential applicants will buy or hold property for long range business planning purposes but without any notion of what projects they will propose for a particular site at some indefinite point in the future. Other prospective builders and possible §404 applicants speculate about the project potential of property and buy land when the costs are relatively low, creating the opportunity to provide a lower cost product to consumers, and increasing the chances of building a profitable project.

REASONS FOR GRANTING THE WRIT

The EPA's view of the law, as presented by its "market entry" theory, is unworkable and unreasonable. The attainment of worthwhile goals should not violate economic reality and common sense. The ends should not justify the means. Moreover, EPA's short-sighted, albeit zealous, attempt to protect wetlands is inconsistent with the important goals of the Clean Water Act.

Most home building and light construction in this country is performed by builders who may have no staff or employees. The vast majority of builders are small businesses. Most are not equipped to deal with such a standardless and vague regulation as represented by EPA's market entry theory. But even a well staffed large developer with substantial financial resources could reasonably miscalculate the supposed time of entry into a market. When a §404 permit application is filed two, three or more years after the applicant reasonably thought it "entered into the market" the EPA or the Corps could assert that the relevant market was really entered into a few months before the applicant assumed it did, and further assert that within those few months an alternative site was avail-

able and feasible. The applicant must somehow turn back the clock in its attempt to rebut the presumption of availability and gather often evaporated evidence to establish that the alternative site was not feasible for its intended project.

Even if an applicant could "enter a market" at some defined point in time, the market entry theory will force potential applicants to prematurely exert control over possibly many potential alternative sites in order to adequately evaluate them. This will expose an applicant's plans to competitors and to sellers, resulting in great increases in the cost of land and projects. The market entry theory throws all existing *and often required* practices of project planning, land acquisition and real estate financing into a black hole of absurdity.

This type of regulatory interpretation exceeds what could be reasonably expected as part of the cost of doing business in a regulated society. Compliance with this new regulatory policy is much more than just onerous. Compliance is impossible given the difficulty in establishing wetland boundaries and the necessary project planning processes that lead to the preparation of a physical site plan. An alternative and reasonable regulatory interpretation can provide a clear point in time to judge whether there are practicable alternatives and do justice to the Clean Water Act. The time a party files a permit application or, in the alternative, the time a potential applicant receives a jurisdictional determination that a proposed site has wetlands (whether before or after land acquisition) provides a definite point in time by which all concerned parties can evaluate practicable alternatives to potential adverse impacts on the wetlands.

The EPA's imposition of its market entry theory on §404 permit applicants has very serious consequences for project planning, land acquisition and finance practices, the provision of affordable housing and other structures and products required by society, and the necessity of good comprehensive land use planning by local and state gov-

ernments. Some degree of common sense is now desperately needed in the national wetland protection effort. The seriousness and immediacy of this new problem concerning an important question of federal law warrant the exercise of this Court's power of supervision.

I. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE EPA'S NEW AND UNREASONABLY BROAD THEORY OF PRACTICABLE ALTERNATIVES IS MEANINGLESS TO PERMIT APPLICANTS, IGNORES THE REAL WORLD AND WILL BE DETRIMENTAL TO SOCIETY

A. The Undefinable Nature Of "Market Entry" Creates A Likelihood Of Unbridled Agency Discretion And Fails To Provide Potential Applicants Any Meaningful Guidance To The Conduct Of Their Affairs

The unreasonably broad agency discretion that the market entry theory creates has caused widespread confusion within the regulated community. Despite EPA's inept attempt at restricting the future use of its market entry theory,[3] the vast community of possible §404 applicants does not know how to conduct its affairs and meet its regulatory obligations because it has no idea what market entry means. Also, by establishing this market entry theory, the "EPA likely will exercise its section 404(c) veto authority with greater frequency than it has in the past." Steinberg and Dowd, *Economic Considerations In The Section 404 Wetland Permit Process*, 7 Va. J. Nat. Resources L. 277, 297 (1988). Of course, we do not contend that there is anything wrong with EPA exercising its authority, if it sustains its burden of proof, to prohibit unacceptable adverse impacts to the aquatic environment. But with "market entry" at its side, "it will become more difficult for applicants to predict in the initial planning stages of a project what EPA, in subsequent years and with the

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[3] EPA Final Determination of the Assistant Administrator for External Affairs, n.14 and accompanying text (May 13, 1986), reprinted in the Pet. for Cert. at 93a (hereinafter cited as Final Determination).

benefit of hindsight, might consider to be practicable alternatives in a section 404(c) veto proceeding." *Id.*

Considering that the time period over which a project's evaluation and planning is conducted can vary from days to years, the EPA has created a theory that allows itself (or any Corps district or division engineer)[4] to fix market entry at virtually any point it chooses. The time of entry into a market for a particular project is an undefinable concept. At best, the time of entry into a market could spread over several years, depending on the way a particular property owner conducts its affairs, the various constraints and requirements of market forces, lenders and investors and the wide range of possible yet reasonable interpretations of "market entry." Market entry could reasonably mean anytime between a project's initial conception in an individual's imagination to the filing of a §404 permit application. This market entry "window" could be extended even further forward in time up to the point of a final decision on alternatives by the EPA pursuant to its §404(c) veto authority or further back in time to the point of creation of the applicant's business. The members of these *amici* looking for guidance on how to conduct their affairs peer through this market entry window and see a meaningless panorama.

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[4] The Corps is composed of four levels of authority: district engineers, division engineers, the chief of engineers, and the Secretary of the Army.

. . . .

> The Corps is 'highly decentralized.' Throughout the United States, there are thirty-six district engineers and eleven division engineers. The applicant may not appeal a permit decision made by the district or division engineer. See [33 C.F.R.] §320.1(a)(2)(1987).

Lawson, *The Corps Of Engineers' Public Interest Review Under Section 404 Of The Clean Water Act: Broad Discretion Leaves Wetlands Vulnerable To Unnecessary Destruction*, 34 J. Urban & Contemp. L. 203, 212 n.50 (1988).

The very real possibility of EPA choosing an initial market analysis as the point of market entry makes no sense in the regulated community since at that planning stage the applicant had not decided nor was it capable of deciding whether it would acquire land in the community or even if the project could be built profitably. But EPA could hold the applicant accountable for having evaluated the practicability of each and every possible site in some undefined "alternatives" region where the project might be constructed.

The confusion is compounded for those potential applicants who have owned property for years or who buy property on speculation without a specific project in mind. Also, since the Second Circuit stated, following EPA's argument, that Pyramid Companies "should be held to stand in its predecessor's shoes," *Bersani*, 850 F.2d at 41, the applicant's window of "opportunity" to look for practicable alternatives can be extended indefinitely into the past. Why did the Second Circuit or EPA stop with Pyramid's immediate predecessor, DeBartolo? DeBartolo had a predecessor as well. In fact, "[e]fforts to build on Sweeden's swamp began in February, 1979," *Citizens For Responsible Environmental Management v. Attleboro Mall, Inc.*, 400 Mass. 658, 660, 511 N.E.2d 562, 564 (1987), which was before the promulgation of the final §404(b)(1) guidelines in 1980. Does this mean that all permit applicants must look at what practicable alternatives existed in 1980 for their current projects? Or will EPA require even a further retroactive application of its new theory and look to the 1970's or beyond? How, by any notion of common sense, can this type of standard be "specific enough to put a developer on notice of when it should be considering alternative sites[?]" *Bersani*, 850 F.2d at 46.

B. The Uncertainty Enveloping The Implementation Of The Market Entry Theory Will Require All *Potential* Permit Applicants To Prematurely Secure Purchase Options On Multiple Tracts Of Land, Resulting In Great Increases In The Cost Of Projects Required By Society

Assuming an applicant could "enter a market" at a specific point in time for a potential site that will satisfy the needs and purpose of the applicant's proposed project, EPA still has a blind view, endorsed by the Second Circuit, of project planning, land acquisition and real estate finance practices. The various elements of these practices are necessary to deliver quality products at the lowest possible price to society. By abandoning an understanding of this reality, the EPA has failed to consider relevant factors in applying the alternatives analysis. The inequities in this theory must be corrected if the balance between environmental and economic values envisioned in the CWA is to have any meaning.

The market entry theory would have the applicant combine its initial narrowing search for a feasible site with application of the alternatives test. This forces the potential applicant to obtain options on or otherwise tie-up the sites that will be the subject of the permit application and the alternatives analysis in order to adequately evaluate whether all sites are truly alternatives (i.e., to determine actual wetland boundaries and preserve the true availability of the site) . Under the Second Circuit's rationale, *all* property, presumably within a given radius of the applicant's proposed site or region surrounding that site, would be "arguably available" for purposes of the regulation. *Bersani*, 850 F.2d at 41. This is so because in EPA's view an applicant could have simply bought the rights to a prime alternative site from a competitor, regardless of whether the site is actually on the real estate market. The EPA has expanded the commonly accepted and understood meaning of available property into a realm of irrational thought.

The cost of all the options or similar controls over the sites would have substantial and adverse financial impacts

on the project. However, the actual cost of all the options to purchase would only be the beginning of the financial impact on §404 applicants. Since it would be impossible to conceal the potential applicant's activities from competitors or the current owners of the potential sites, the recognition of a demand in the market would drive up land prices, possibly beyond the project's feasibility, but definitely at the expense of needlessly adding to the cost of delivering the project to the public.

The market entry theory forces the applicant to make commitments and take a substantial financial risk by purchasing an option for a site far too early in the project planning process and well before the applicant or its investors are ready to take that risk. Under the theory, applicants must evaluate sites well before they have developed or could develop any type of physical site plan. Without making a significant investment in the preparation of a physical site plan, and preparing one for each possible site, an applicant does not know if the project will even require a permitted fill. Although EPA would assert that the Corps' and its own boundary delineation methodologies are not binding, that merely adds to the uncertainties for potential applicants. The market entry theory forces applicants to prematurely look for other sites when, after receiving a jurisdictional determination, the applicant could simply avoid adverse impacts on the aquatic environment by redesigning its site plan.

This new "market entry" theory also significantly decreases the predictability of project and land acquisition plans and thereby greatly increases the financial risk to the 404 applicant. Without any guidance from the agencies or the courts, how is an applicant to know if the Corps engineer or EPA Regional Administrator will agree on the applicant's guess about the particular site it finally chooses for its project? The increased financial risk will exclude access to lenders and investors for all project proponents except those few with the very best track records or those with very small projects.

In order to do justice to the practicable alternatives analysis and particularly the question of availability of alternative sites, two watershed events must occur. First, an applicant needs to reach the stage of physical site plan preparation for the intended project and, second, must acquire definitive knowledge about wetland boundaries. The market entry theory requires an alternatives analysis well before the confluence of these two common sense prerequisites.

II. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE MARKET ENTRY THEORY IS FUNDAMENTALLY INCOMPATIBLE WITH THE PRINCIPLES OF COMPREHENSIVE LAND USE PLANNING AND IN PRACTICE CAN VITIATE A COMMUNITY'S EXPRESSION OF WHAT DEVELOPMENT IT WANTS

Land use planning and land use and environmental controls are inextricably intertwined, and are necessarily so if rational provision is to be made for the use of land on a basis that benefits the community as a whole and is consistent with the reasonable interests of individual property owners. However, EPA's market entry theory clashes with the practice of land use and urban planning because it fails to recognize that the comprehensive planning process looks toward the future.

One of the principal objectives of a community's comprehensive plan is to express what the community wants to be at some specified point, typically five, ten or twenty years, in the future. Fundamentally, it is a physical plan and statement of community policy that "translates values into a scheme that describes how, why, when, and where to build, rebuild, or preserve the community." International City Management Association, The Practice Of Local Government Planning 60 (2d Ed. 1988). The vision of the plan is pursued through a variety of implementing zoning ordinances, subdivision regulations and numerous other ordinances that regulate such issues as stormwater runoff, the provision and construction of infrastructure and natural resource protection.

A comprehensive plan provides both the public and private sectors a rational basis from which to judge a proposed project's appropriateness and feasibility. A project proponent's ability to obtain state and local approvals and permits is determined by the project's compliance with the existing plan and its current implementing ordinances, regardless of when land was acquired.

In contrast, the conditions EPA looks at concern when a particular permit applicant entered the market for its project. When an applicant purchased a site, took an option on a site, hired a market analyst or performed some other similar but as yet undefined factor, are factors wholly unrelated to whether a particular project will fit the community's plan. These conditions are irrelevant from a land use planning perspective. The market entry theory runs counter to land use planning goals when land use and environmental regulations should work to effectuate those goals.

EPA apparently does not recognize as a relevant factor the zoning on an alternative site at the time EPA determines that an applicant entered the market. Only through hindsight could EPA know that the zoning on the North Attleboro site would change due to the efforts of New England Development. See Final Determination, *supra*, reprinted in Pet. for Cert. at 90a. The market entry policy could then require an applicant to seek rezonings, zoning variances, special permits or exceptions or other changes to the comprehensive plan. If a community needs the particular project for economic development, housing or other purpose to promote the public health, safety and welfare it will be forced to rewrite its comprehensive plan and implementing ordinances to accommodate EPA's view of where a project should go. By doing this, the EPA has potentially destroyed the hope of local communities of effectively implementing their comprehensive plans and associated land use controls. The ramifications of this type of federal second guessing could be disastrous.

While at times it will be necessary for the federal government to override local and state plans because of im-

portant national concerns, such as environmental preservation, the wholesale detraction of a community's land use ideals on irrelevant grounds should be prohibited by this Court.

III. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE MARKET ENTRY THEORY WILL LEAD TO ILLOGICAL AND INEQUITABLE DECISIONS AND IS UNNECESSARY TO PROMOTE WETLAND PROTECTION

The EPA claims that the market entry approach is necessary to carry out the purpose of the CWA. That is, it will force property owners to make decisions to protect wetlands before they commit to a particular site. Assuming for argument's sake that a definite time could be established for entry into a relevant market, an analysis of alternative sites at that time could show that there are no alternatives (i.e., the applicant expends substantial resources in evaluating and proving that other sites are either not available or not feasible, rebutting the presumption of practicable alternatives). However, by the time the applicant is ready to apply for a §404 permit an alternative site could become available or feasible for the project.

In the real world, alternatives come and go all the time. The boundaries of wetlands change over time as well. There may actually be more alternative sites at the time of permit application. Presumably, EPA would then argue that it can also use the time of permit application to analyze practicable alternatives, Pet. for Cert. at 22 n.16, forcing the applicant to again perform an expensive feasibility analysis of the new potential alternative site.

The whole purpose of an applicant's elaborate market analyses, feasibility studies and site analyses is to reduce the inherent risk in the real estate development business. Market forces and competition impose a substantial financial incentive on applicants to limit risk. Anyone that does not heed those natural incentives will shortly go out of business. Avoidance, if possible, of either economic or environmental conditions adverse to a project will always be

an applicant's preferred course. But the Second Circuit says, "[w]hether most real-life developers would take such a risk is irrelevant." *Bersani*, 850 F.2d at 44. How can a reading of the Clean Water Act and the §404(b)(1) guidelines meet the requirements of common sense when that interpretation expressly ignores reality?

The market entry theory also creates anomalous results, as demonstrated by a slightly revised hypothetical factual setting. Here, according to EPA the North Attleboro site was available to Pyramid before New England Development (NED) bought it. However, if Pyramid had bought it first, as EPA's market entry theory requires, and NED then pursued a project on Sweedens Swamp, would EPA's theory then submit to an assertion by NED that the Sweedens Swamp site has no practicable alternative and, therefore, let NED proceed to the next step in the permitting process? Presumably not. EPA would assert that the North Attleboro site was available to and feasible for NED when it entered into the market. The paradox for Pyramid, NED or any other latecomer who could build a viable project is glaring. How can *one* site be a practicable alternative to two competing businesses at the same time? Before this case, denying a §404 permit on this basis was beyond plausible argument.

The imposition of this unreasonable market entry theory is unnecessary to protect wetlands and further the purposes of the CWA. If the applicant rebuts the presumption that there are practicable alternatives, the Corps still can deny a permit if the discharge of dredge or fill material "will cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. §230.10(c) (1987). If the Corps issues a permit after its extensive review process, the EPA then can, under its §404(c) veto authority, prohibit a permit by asserting that the proposed dredge or fill activity "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. §1344(c)(1982).

Of course, EPA when acting under §404(c) has the burden of proving "unacceptable adverse impacts," *Bersani*, 850 F.2d at 40, a burden EPA abrogated in this case by asserting that EPA has proven its position on unacceptable impacts because the applicant has failed to prove its position, pursuant to §404(b), on alternatives. The EPA's argument presents a striking incongruity. If the existence of an alternative makes the environmental impact on a site unacceptable, does the lack of an alternative transform the impact into an acceptable one? How can the agency measure the actual environmental impact on a wetland environment by examining what someone could do on an unrelated upland site?

Section 404(c) is intended to protect environmental interests. It acts as an environmental safety check on the permitting process. Therefore, EPA under §404(c) could properly consider the Corps' environmental judgments related to "significant degradation," 40 C.F.R. §230.10(c)(1987), or on "appropriate and practicable steps" to mitigate potential adverse impacts. 40 C.F.R. §230.10(d)(1987). But §404(c) does not authorize reconsideration of fundamentally nonenvironmental judgments made by the Corps, as was done by EPA in this case. The EPA is an environmental agency and has little or no expertise in the economic matters that are impinged by its market entry theory.

CONCLUSION

For the reasons stated above and in the Petition for Certiorari filed by Bersani, et al., this Court should issue a writ of certiorari to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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JOHN A. BERSANI,
NEWPORT GALLERIA GROUP,
ROBERT J. CONGEL
and the PYRAMID COMPANIES,
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF THE AMERICAN PLANNING ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The American Planning Association respectfully moves for leave to file the attached brief as *Amicus Curiae* in support of the Petitioners. Consent to file the brief has been obtained from the attorney for the Petitioners Bersani, *et al.*, Petitioners Robichaud, *et al.*, and Respondent United States Environmental Protection Agency. The consent of the attorney for Intervenors-Respondents Sierra Club, *et al.* was requested but refused.

As more fully explained in the attached brief, the American Planning Association agrees with EPA's objective of protecting wetlands. The American Planning Association has adopted a policy urging that high priority be given to public acquisition of wetlands for protection, preservation, and restoration. The concern, therefore, is not with EPA's goal, but with the means it has chosen to achieve that goal.

The interests of the American Planning Association lie in seeing that clear, fair, uniform, rational rules exist for the development of areas which impact wetlands. The decision below would make rational wetlands planning impossible.

Because of the more than 14,000 permit applications processed each year by the Corps of Engineers (with EPA veto power) under §404 of the Federal Water Pollution Control Act, the existance of the opinion below as the definitive authority on the application of that law threatens chaos in rational planning by governmental bodies as well as private developers. For that reason, the American Planning Association believes that this Court's review is needed, and submits the attached brief in support of the Petitioners.

Respectfully submitted,

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No. 88-902

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

JOHN A. BERSANI,
NEWPORT GALLERIA GROUP,
ROBERT J. CONGEL
and the PYRAMID COMPANIES,

Petitioners,

vs.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.,*

Respondents.

BRIEF OF THE AMERICAN PLANNING ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

By leave of Court, the American Planning Association files this brief as *Amicus Curiae* in support of the Petitioners.

INTEREST OF AMICUS CURIAE

The American Planning Association is a nonprofit, public interest, and research organization, whose 21,000 members are dominantly professional planners, elected and appointed government officials, and citizens involved in urban and rural planning.

The primary objective of the American Planning Association is to advance the use of planning to improve the development of the nation, its communities, and to conserve the nation's resources. In furtherance of those objectives, the American Planning Association and its 45 chapters (divided roughly along state lines) and 15 substantive divisions (environment, transportation, economic development, *etc.*) sponsor research of interest to the planning community and sponsor award programs to acknowledge outstanding planning programs, projects, and individuals.

When issues involving the interrelationship of law and planning are before this Court, the American Planning Association seeks to provide assistance through the filing of *Amicus Curiae* briefs.

As professionals in land use planning, the members of the American Planning Association are concerned about the potential impact of the decision below if it is allowed to stand.

Bluntly, from a land use planning perspective, the decision makes no sense. It approves a "standard" for examining the impact of proposed development affecting wetlands which cannot be recognized as a standard. The opinion expressly approves — indeed, seems to find laudatory — the fuzziness of the "standard" which it endorses:

> ". . . it is unnecessary to pin down the standard to such a degree and . . . it would confuse things further to attempt to do so." (850 F 2d at 46)

With respect, that is not wise planning. It hardly qualifies as "planning" of any sort. It leaves so much to

discretion that no one can know — until EPA rules, after the fact — what the rules *were* when the acts were done.[1]

Moreover, by making the determinative time in the development process the point at which some developer gave some thought to pursuing a project, the opinion can upset the ability of public agencies to plan for the future, and subject public agencies to inverse condemnation claims.

The potential impact of the decision is vast. As the opinion of the Court of Appeals acknowledges, the Corps of Engineers processes more than 11,000 wetland permit applications *each year*, and the rule established below could be applicable in *each* of those thousands of proceedings.[2]

The American Planning Association agrees with EPA's objective of protecting wetlands. The American Planning Association has adopted a policy urging that high priority be given to public acquisition of wetlands for protection, preservation, and restoration. The concern, therefore, is not with EPA's goal, but with the means it has chosen to achieve that goal.

---

[1] As this brief is being written, EPA is threatening to veto a 3,301 home development (including low-and moderate-income housing) in Secaucus, New Jersey. (See news article attached as an appendix.)

Apparently emboldened by the Court of Appeals' approval of the standardless "standard" applied in the case at bench, EPA's Acting Regional Administrator has announced that he will veto the project because, although the developer showed that the homes could not be built elsewhere in a 471 square mile, three county, area, it had not been shown that the project could not proceed in some more distant locale. How distant? He wouldn't say. With respect, that is not planning by any definition.

[2] The total is actually closer to 14,000 per year. (See Pet for Cert, p 4, fn 1.)

The interests of the American Planning Association lie in seeing that clear, fair, uniform, rational rules exist for the development of areas which impact wetlands. The decision below makes rational wetlands planning impossible.

REVIEW OF THE DECISION BELOW IS IMPORTANT TO AVOID CHAOS IN THE ADMINISTRATION OF THE FEDERAL WETLANDS REGULATION PROGRAM

There is no need for this Court to await further developments in lower courts before addressing the issue in this case. The competing viewpoints are starkly presented here in the majority opinion by Judge Timbers and the dissenting opinion by Judge Pratt. One of those views (the dissent) makes sense; the other makes a shambles of rational planning.

Thus, while this may be, as the majority below says, a case of first impression (850 F 2d at 45), the time to deal with it is now, before significant mischief is done in the thousands of wetlands permit proceedings the Corps conducts each year.

In reviewing federal statutes of widespread application, this Court has acknowledged the propriety of deciding important issues early, even when they are first impression issues addressed by only one Court of Appeals. (*American Federation of Musicians v. Wittstein* [1964] 379 US 171, 175 [question was "an important one of first impression under the" federal statute]; *U.S. v. Ruzicka* [1946] 329 US 287, 288 ["raises questions of importance in the administration of the" federal statute]; *Rothensies v. Electric S.B. Co.* [1946] 329 US 296, 299 [certiorari granted because of the "gravity of this holding to the administration of the tax laws"]; *National Broiler*

Marketing Assn. v. U.S. [1978] 436 US 816, 820 [certiorari granted because "of the importance of the issue for the agricultural community and for the administration of the antitrust laws"])

The issue presented here is as important to land use planners, government regulatory agencies, property owners and developers, and the proper administration of a federal program which involves 14,000 permit applications *each year*, as it was to those involved in each of the cited cases.

Review now is important to avoid chaos in the administration of the program.

IT MAKES NO SENSE FROM A PLANNING PERSPECTIVE TO DETERMINE WHETHER A PERMIT SHOULD ISSUE BY EVALUATING ALTERNATIVE PROJECT SITES WHICH WERE THEORETICALLY AVAILABLE AT THE FIRST MOMENT THE PROPONENT THOUGHT ABOUT DEVELOPING A PROJECT

The legislative history and plain meaning of section 404 of the Federal Water Pollution Control Act (33 USC §1344) are ably discussed in the Petition, and need not be repeated.

What concerns the American Planning Association is EPA's interpretation of the guidelines for application of that statute, which appear at 40 CFR §230.10. The guidelines explain when a permit for development which impinges on wetlands ought to be denied because of the existence of alternative sites for the project which will not so impinge:

> "(a) Except as provided under section 404(b)(2) [pertaining to navigation] no discharge of dredged or fill material shall be permitted if there *is* a *practicable alternative* to the proposed discharge which would have less adverse impacts on the acquatic ecosystem . . .
>
> "(2) An alternative *is practicable* if it *is available* and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it *is* otherwise a practicable alternative, an area *not presently owned* by the applicant *which could reasonably be obtained*, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered." (Emphasis added.)

EPA had taken a guideline which is plainly written in the *present* tense and interpreted it in the *past* tense. It has decided to determine whether an alternative *is* available by determining what *was* available at some hazy point in the past. The Court of Appeals' majority not only approved this transformation, it permitted it to be done in such a vague way (by evaluating conditions at the time of "market entry" — whatever that may mean) that it created a "standard" which is not capable of fair or rational application.

A

The "Standard" Is Not a Standard

Planning and zoning officials are familiar with the need for standards. Indeed, as a matter of settled land use law, delegation of power to an administrative agency is invalid unless accompanied by sufficient standards to guide both the agency and the project applicant:

> "To properly delegate, the legislature must specify standards to guide an administrator's zoning decision. The standards should clearly state how the administrator is to apply zoning laws in a manner which protects individual property rights from abitrary decision-making." (Kmiec, *Zoning and Planning Deskbook* [1986] §4.05[2], p 4-26; *see also* Mandelker, *Land Use Law* [2d ed 1988] §6.02, p 205.)

Federal agencies are likewise familiar with the need for standards, so that applicants will know how to conform their conduct. (*E.g., Port Terminal R.R. Assn. v. U.S.* [5th Cir 1977] 551 F 2d 1336, 1344-1345.)

Such standards need to be objective, so that they may be fairly and uniformly applied by any administrator to any applicant.

Here, the Court of Appeals majority creates no standard. EPA simply decided that it would view the availability of alternative sites as of the date the project applicant "entered the market" for property for the project. However, EPA refused to specify what "market entry" means, or even that it would mean the same thing in all cases. And the Court of Appeals held that to be a sufficient "standard" for local government agencies and private citizens to understand.

But it is not. The announced "standard" is as amorphous as it is subjective.

As shown in the Petition, each time the EPA issued a decision or filed a brief, and even at different points in the same document, it changed the way the "standard" was viewed. (Pet for Cert, pp 13-14) EPA insisted on a Will-o-the-wisp "standard," which it could enforce at its whim, and the Court of Appeals' majority approved.

Moreover, as Judge Pratt's dissent ably highlights, the "standard" is subjective to an extreme: it is focused entirely on the *identity* of the permit applicant and when that particular applicant first started looking for a site, rather than on the protection of the wetland. (850 F 2d at 48-49)

An amorphous, subjective "standard" is no standard at all. (*See Messiah Baptist Church v. County of Jefferson* [D Col 1987] 697 F Supp 396, 399.)

B

The "Standard" Makes No Sense

The market entry "standard" is incapable of rational application in any manner which permits either government agencies or private developers to know what to expect from EPA when plans are evaluated for §404 compliance, years after they have been made.

First, WHEN is the line drawn? The Court of Appeals refused to require EPA to specify *when* "market entry" occurs. It could occur when some company official (or government employee, if the project is a public one) first muses about the project. It could occur when that person begins looking for possible sites. It could occur when general plans are begun, or discussed, or finally approved. It could occur when applications

for permits are made, or considered, or ruled on. It could occur when offers to purchase are made, or when a purchase is consummated. If the project requires multiple purchases (as is often the case with public projects), it could occur at any point in the land acquisition assembly process. It could even occur when someone else thought of the project.[3]

The alternative sites available at "market entry" may have become unavailable years before permit application. In such cases, needed public projects may be vetoed by EPA — and thus never be constructed — despite the public need for them, and despite the fact that *no* alternative sites exist when the project is sought to be transformed from a desired plan to a concrete facility.

Rational planning cannot occur in such circumstances. The problem is that the consequence of *when* the action is evaluated is critical to a determination under §404. It is the availability of alternatives on that date which determines whether a project will be permitted or not.

Second, HOW is the line drawn? The central question in a §404 review is the availability of alternative sites. Under the "standard" approved by the Court of Appeals, alternative sites will *always* (in a theoretical sense) be "available." That Court said:

> "In its final determination [EPA] stated several reasons why it believed the North Attleboro site should be deemed to have been 'available.' It stated, among other things, (1) that *NED could 'have been talked into relinquishing its interest' in the*

---

[3] Please recall that the majority below suggested that "market entry" could have occurred in this case when the company from whom the present developer bought the property first thought about the project. (850 F 2d at 47)

site even in September or December 1983 . . ." (850 F 2d at 47; emphasis added.)

Disregarding, for the moment, that NED was a *competitor* of the applicant in this case, whose presumed receptivity to "relinquishing its interest" seems problematical at best, the theory behind that statement means that *all* sites (presumably developed or undeveloped) which could be transformed to suit the proposed project need to be considered as "available" alternatives because their present owners might be "talked into relinquishing [their] interest."

Such an interpretation makes a sham of the statute. It removes any pretense of a "standard" by which ordinary mortals can measure their conduct, by compelling them to pursue the purchase of any number of alternatives, whether they are currently in use or not. While the suggestion seems absurd on its face, it is the logical meaning of the quoted passage from the majority opinion below.

Third, WHERE is the line drawn? As shown in the attached news article, EPA has apparently become emboldened by the approval of its amorphous reading of the requirements of §404, and is now casting its net in a broad *geographic* manner to determine the existence of "available" alternative sites. If a project proponent can be told that ascertaining that there are no available sites in a three county, 471 square mile, area is not sufficient to satisfy the statute, then there is no way to satisfy the statute.

It would appear that EPA is embarked on a program not envisioned by Congress. Congress, as the Petition aptly shows, drafted a statute with clear standards. Apparently, EPA would prefer it if the statute were worded differently. However, as EPA has been told in the past, it must enforce what Congress passes, regardless of EPA's view that something else may have been

more practical or achieved a better result. If EPA wants something other than what Congress passed, it must seek an amendment to the statute. EPA may not alter the statute by regulatory interpretation. (*E.g., NRDC v. EPA* [DC Cir 1973) 475 F 2d 968, 970; *Association of American Railroads v. Costle* [DC Cir 1977] 562 F 2d 1310, 1318-1320.) The *Railroads* case is outspoken:

> "The EPA argues that its interpretation of the Noise Control Act should be accorded deference by a reviewing court because it is the agency charged with administering the Act. While it is an established principle of administrative law that reviewing courts will generally 'show "great deference to the interpretation given [a] statute by the officers or agency charged with its administration," ' *this principle has no application where, as here, the agency has misinterpreted its statutory mandate.* In such cases of misinterpretation, it is our duty to correct the legal error of the agency as we have done here." (562 F 2d at 1318-1319; emphasis added.)[4]
>
> "The EPA argues quite strenuously that 'practical factors' compel the conclusion that Congress did not intend all railroad equipment and facilities to be regulated. EPA contends that '[i]t is inconceivable that Congress intended EPA to investigate

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[4] As this Court bluntly stated in *Espinoza v. Farah Mfg. Co.* (1973) 414 US 86, 94-95:

> "Courts need not defer to an administrative construction of a statute where there are compelling indications that it is wrong."

> and control every inconsequential piece of railroad equipment . . .'
>
> * * *
>
> "This is perhaps an understandable effort to introduce an element of flexibility into the promulgation of noise emission standards. It is not, however, for us as a reviewing court to add this dimension of flexibility to the statutory framework. Congress has dictated that the EPA regulate 'the equipment and facilities' of interstate rail carriers. Congress has *not* provided the agency with the type of discretion it evidently desires and contends for in this case. We are bound to effectuate the legislative will and we perceive it to be unambiguous in this context. If the EPA desires an element of flexibility in its operations, the agency must look to Congress and not to the courts." (562 F 2d at 1319-1320; emphasis, the Court's.)

The "standard" concocted by EPA and approved by a 2-1 vote of the Court of Appeals is unworkable. This Court's review is needed to restore order to this statutory review procedure.

C

Adverse Impact of the "Standard" on Planning for the Construction of Necessary Public Facilities

As a planning tool, which must be used by government agencies as well as private developers, the market entry "standard" is useless. To be effective, planning —

whether corporate or governmental — needs to focus on long range goals. Anything less is not planning, but short-run "damage control."

The "standard" upheld below will seriously impair long range planning for needed public facilities. Indeed, it may make it impossible to plan in areas with wetlands.

In applying its "standard," EPA relied on hypothetical evidence supplied by the "trade custom" of developers to investigate potential sites for several months before purchase. (850 F 2d at 47)[5] If that is an appropriate "standard" for judging project applicants, it would cripple governmental projects. For it is equally well known that the "trade custom" in governmental circles is to take a longer look at potential projects than the few months hypothesized below.

Partly because of statutory requirements, partly because of the scope of governmental projects, and partly because of the political need to obtain significant public input before embarking on major projects, government agencies sometimes consume years in the planning of facilities. When was their "market entry" for §404 purposes? Under the rationale below, major public works projects could be disapproved by EPA after years of planning, analyses, reports, and hearings before various state and local bodies because EPA concluded that, when the process began many years earlier, a less intrusive alternative existed.

The problem with public projects today is that they require *too much* time from initial thought to pouring concrete. This causes difficulties for the agencies planning those projects, the property owners in the path of the projects, and the general citizenry which will

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[5] Although the District Court rejected this ground, the Court of Appeals' majority says it may be entitled to some weight, at least when joined with other considerations. (850 F 2d at 47)

eventually benefit from the public projects. The decision below could lengthen that process still further and, potentially, preclude construction of some projects altogether — regardless of their evident need — because of EPA's after-the-fact conclusion that a once-available alternative was not considered.

EPA's need to protect wetlands is not here questioned. However, the protection of wetlands can be accomplished in a manner which does not grind long range planning to a halt. Local planners are not the villains in the piece. In fact, they may be better able than EPA to understand the *actual* availability of local alternatives.[6]

IMPLEMENTATION OF THE "STANDARD" WILL SUBJECT GOVERNMENT AGENCIES TO THE RISK OF INVERSE CONDEMNATION JUDGMENTS FOR LONG-RANGE PLANNING ACTIVITIES

This Court's decisions have generally insulated government's general planning function from actions by property owners who claim that governmental plans have taken their property without compensation, in violation of the Fifth and Fourteenth Amendments. So long as only planning has taken place, and the rights of private property owners are not infringed, no governmental liability arises. Even the filing of an action to condemn

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[6] Interestingly, a recent report of the National Wetlands Policy Forum, convened by the Conservation Foundation at the request of EPA, concluded that wetlands conservation would be better managed at the local level. (Conservation Foundation, *Protecting America's Wetlands: An Action Agenda, The Final Report of the National Wetlands Policy Forum* [1988])

property, accompanied by the filing of a *lis pendens* has been held not to be sufficiently acquisitory of an interest in private property to require compensation before the acquisition is consummated. (*Kirby Forest Indus., Inc. v. U.S.* [1984] 467 US 1, 13-15.)

The decision below undermines the *Kirby* precept, and may render government liable for compensation for regulatory takings (see *First English Evangelical Lutheran Church v. County of Los Angeles* [1987] 483 US ___, 96 L Ed 2d 250) for doing no more than planning for future development.

For example, it is not unusual for state and local government to prepare plans for future highways many years before they have any intention to construct them. (Indeed, they may never be constructed at all.) Given the considerations which must go into such planning (*e.g.*, evolving transportation needs, environmental impact evaluations, population growth patterns), both the planning process and implementation of the plan can take many years. The following statement by the California Supreme Court (denying compensation for the effects of long-range highway planning) is typical:

> "We can acquiesce in the following proposition: if the only acts of which plaintiffs complain were the adoption of the route, the designation of their land for future acquisition, and the purchase of some of the properties along the right of way, *there would be no such direct and special interference* with plaintiffs' rights as to justify an action in inverse condemnation. As was pointed out in *Smith v. State of California* . . . planning and construction of a freeway requires a substantial period of time, and a holding that announcement of the plan for the freeway

> results in inverse condemnation of properties designated for ultimate acquisition would result in the forced purchase by the state of large amounts of property which might never be used and would severely hamper the government's ability to make needed improvements in the highway system. The need for flexibility in planning, changing the design of, or even abandoning a proposal for a highway militates against the theory that an action for inverse condemnation lies for the general effects of such conduct." (*Jones v. People ex rel. Dept. of Transportation* [1978] 22 Cal 3d 144, 152, 583 P 2d 165; emphasis added.)

The decision below casts serious doubt on the validity of that reasoning, particularly if the public project is along any part of the thousands of miles of shoreline within the Corps' wetlands jurisdiction.[7]

Under the decision below, the critical moment is the *first* time the government planners *thought about* establishing the highway route or other public facility, *not* the time the property was actually acquired for the project. If *that* becomes the focal point for §404 evaluation, it would seem difficult for a court to hold simultaneously that that same early date is *not* also the appropriate time to evaluate the impact of the proposed project on private property owners who would be adversely affected by the project upon fruition. For, if all alternatives must be considered at the first inkling that a project may go forward, and the positions of the parties are frozen at

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[7] Although the concern in this case is with wetland areas, the analysis applies equally to other public projects in non-wetland areas nationwide.

that time, then the impact on private property owners in the path of a contemplated public project will be direct and substantial at the time of "market entry." The traditional view that a general plan is a vision of what *should* happen in the future will have to be discarded, as the specific sites noted on the plan will be concretely targeted for acquisition, severely impairing the rights of the owners of those parcels to use them in any economically viable manner.

Thus, aside from the failure of the "market entry" standard to make sense as a planning tool, it could end up either subjecting government to numerous suits for compensation when plans are initially formulated, or so inhibiting government from planning that long-range plans will simply not be drawn.

Neither result is in the public interest.

CONCLUSION

A 2-1 majority of the Court of Appeals has approved an *ad hoc* EPA "standard" which no one can rationally articulate, let alone conform to. That "standard," if applied in the 14,000 annual permit reviews conducted by the Corps of Engineers (with EPA hovering in the wings with its standardless veto power), will make a shambles of public planning.

The American Planning Association joins with the Petitioners in urging this Court to grant Certiorari to review the decision below so that proper planning for the use and protection of wetlands may proceed in an orderly fashion.

Respectfully submitted,

FADEM, BERGER & NORTON
MICHAEL M. BERGER

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American Planning Association

APPENDIX

THE STAR-LEDGER, Thursday, November 24, 1988

EPA acts to block proposed 3,300 housing units in Secaucus meadows

By MICHAEL ROZANSKY

The Environmental Protection Agency (EPA) is battling a plan to build 3,301 housing units in meadowlands in Secaucus, seriously threatening the largest housing development proposed for the region.

The EPA's acting regional administrator, William J. Muszynski, said this week in a letter to three congressmen that Hartz Mountain Industries Inc. has failed to prove "that the proposed housing cannot be built elsewhere."

In addition, he wrote, Hartz's plan to compensate for destroying 97 acres of wetlands by upgrading the quality of 116 other acres of wetlands "is not sound environmental planning," in part because it did not create new wetlands.

The project, known as the Villages at Mill Creek, is awaiting approval by the Army Corps of Engineers, which is expected to decide next month whether to issue a dredge-and-fill permit. The EPA advises the Corps, but also can overrule the Corps — and has done so — on permit decisions.

The housing, a crucial part of the housing plan developed by the Hackensack Meadowlands Development Commission (HMDC) in the 20,000-acre district, would rise along the Mill Creek north of Route 3 and west of the eastern spur of the New Jersey Turnpike.

Muszynski said in an interview that he was convinced that Hartz failed to consider "obvious alternative sites" on dry land, such as Newark. "That's one that quickly comes to mind," he said.

"There are alternatives, and if the Corps moves forward and approves the permit, I will exercise my option" and seek to overrule it, he said.

His opposition was revealed in a reply to Reps. Robert G. Torricelli (D-9th Dist.), Robert A. Roe (D-8th Dist.) and Frank J. Guarini (D-14th Dist.). The three wrote EPA Administrator Lee M. Thomas in September seeking his support for the development, which they said would provide "urgently needed homes," including low- and moderate-income housing.

"From a social and economic standpoint," they wrote, "the impacts of this project are clearly beneficial."

The congressmen said Hartz proved that the project could not be developed elsewhere in the 471-square-mile region of Hudson, Bergen and Passaic counties. But Muszynski asked why Hartz limited its analysis to that area.

Asked how far Hartz should have looked, he said, "Obviously I don't expect them to look in Nevada, but it's got to be a case-by-case basis" in which developers show that their analysis is reasonable.

The HMDC has said alternatives should be within the Meadowlands district, which is its area of jurisdiction.

Alan Marcus, a Hartz spokesman, said the project is in accord with the HMDC's 1972 master plan, and addresses the region's housing and environmental needs.

"Ultimately the houses at Mill Creek will be built because it is needed, it makes sense, and it's the right thing to do," he said. "Even when public agencies oppose something, when something's the right thing to do, it gets done."

Hartz has spent millions of dollars to create a 63-acre salt marsh as compensation for taking wetlands for its Harmon Meadow office-shopping development in Secaucus.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rules 36.1 and 42 of this Court, the Chamber of Commerce of the United States (the "Chamber") respectfully moves for leave to file the accompanying brief as *amicus curiae*. The Petition raises issues of great importance to members of the Chamber and the Chamber wishes to ensure that the Court is fully apprised of its views as set forth in the attached brief. Petitioners and respondent the U.S. Environmental Protection Agency ("EPA") have consented to the filing of this brief; respondents the Sierra Club, the Conservation Law Foundation, the Environmental Defense Fund, the National Audubon Society and the National Wildlife Federation have not.

INTEREST OF THE CHAMBER

The Chamber is the largest federation of business organizations and individuals in the United States. Its current membership exceeds 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. Approximately 92 percent of the Chamber's members are small and medium-sized businesses. The Chamber regularly advocates its members' views in court on issues of national concern to American business and this Court has previously granted the Chamber an opportunity to express its views on significant matters.[1] The Chamber participated in this case as *amicus* in the district and circuit courts below. For the reasons set forth below, the Chamber is particularly concerned that the decision by the United States Court of Appeals for the Second Circuit ("Second Circuit") effectively grants EPA unrestrained authority to impose a new rule regarding wetland regulation on a case-by-case basis. The spector of *ad hoc* changes in the regulatory scheme makes investment in development projects unreasonably risky and threatens to eliminate small and medium-sized businesses from the development market.

This case presents several precedent-setting issues of critical concern to the business community. For the first time, the Court has been asked to review the scope of EPA's authority to veto a determination by the U.S. Army Corps of Engineers ("Corps") that a permit for the discharge of dredged or fill material into the navigable waters of the United States should issue. Of particular concern to the Chamber is the appropriate division of statutory responsibility between EPA and the Corps. This issue has been the source of a long-fought battle between the two agencies that began when section 404 (which regulates the discharge of dredged or fill materials), was included in the Federal Water Pollution Control Act of 1972. 33 U.S.C. § 1251

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[1] *See, e.g., Tull v. United States*, 481 U.S. 412 (1987); *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, _____ U.S. _____, 108 S. Ct. 376, 381 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Natural Resources Defense Council v. EPA*, 801 F.2d 457 (D.C. Cir. 1986).

et seq.[2] That section assigns to each agency specific responsibilities in the implementation of its provisions. The EPA has, however, historically sought to limit and even usurp the Corp's statutory responsibilities and has so acted in its Final Determination now before this Court.

Many Chamber members who own or wish to develop property regulated under section 404 of the Clean Water Act have been victims of this ongoing dispute over the scope of each agency's statutory authority. While this interagency tug-of-war has taken many forms,[3] the scope of EPA's authority to review Corps permit decisions is most significant. If EPA's veto of the Corp's decision to issue this permit and the Second Circuit's approval of the agency's action is upheld, these Chamber members — and the business community at large — will be subjected to the same statutory and regulatory overreaching and duplicative agency review that has occurred in this case. The Chamber believes that EPA's intrusion into the Corp's decision-making responsibilities under the Clean Water Act is excessive, unwarranted and not authorized and wishes to present these views to this Court.

Also at issue in this case is the fundamental fairness of EPA's actions and the failure of the agency to provide petitioners with due process of law. Petitioners herein fully complied with the regulations developed under section 404 and relied upon existing definitions with respect to whether a "practicable alternative" exists which will have less adverse impact on the

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[2] The Federal Water Pollution Control Act of 1972 was amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566. The statute, as amended, is commonly referred to as the Clean Water Act. To avoid confusion, the statute will be referred to as the Clean Water Act throughout this motion and the attached brief. The Clean Water Act was further amended by the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7.

[3] *See generally* Liebesman, The Role of EPA's Guidelines in the Clean Water Act § 404 Permit Program — Judicial Interpretation and Administration Application, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10272 (July 1984) (describing interagency disputes over the Corps' jurisdiction over wetlands adjacent to navigable waters and the binding effect of the Guidelines on the Corps).

environment under the applicable section 404(b)(1) Guidelines. *See* 40 C.F.R. § 230.10 *et seq.* In contrast, EPA, in its Final Determination in this case, abruptly and significantly changed the rule relating to the appropriate time frame to be used in the "practicable alternative" analysis. As a result, EPA subjected petitioners to a fundamentally unfair procedure in violation of due process.

It is of vital importance that EPA apply its regulations consistently and in a manner which does not offend the due process rights of petitioners herein and Chamber members which own or wish to develop property regulated under section 404. Unless EPA's action and its interpretation of the applicable regulations are reversed, small and medium-sized businesses, unable to risk capital on unpredictable and unlimited EPA discretion, would be driven from the development industry. Competition would needlessly suffer because the balancing test between economic and environmental concerns, which Congress created as the framework of section 404, would be destroyed.

For the foregoing reasons and as the principal voice of the American business community, the Chamber respectfully requests leave to file the accompanying brief and present to this Court sound legal and public policy reasons why the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Date: December 30, 1988

QUESTIONS PRESENTED

1. Whether the U.S. Environmental Protection Agency ("EPA") exceeded the scope of its delegated authority under section 404(c) of the Clean Water Act, 33 U.S.C. § 1344(c) (the "Act"), Petitioners' Appendix ("App.") E 111-12a, and usurped authority expressly vested in the United States Army Corps of Engineers ("Corps") by section 404(b)(1) of the Act when EPA prohibited the issuance of a section 404 permit to petitioners based on EPA's analysis of the practicable alternatives available to petitioners rather than limiting its review to the environmental criteria set forth in section 404(c).

2. Whether EPA violated its own regulations and the Administrative Procedure Act ("APA") and thereby subjected petitioners to a fundamentally unfair process in violation of petitioners' due process rights, when EPA adopted a new, substantive rule (the market entry test) and applied this rule for the first time, in connection with the EPA "Final Determination of the Assistant Administrator for External Affairs Concerning the Sweedens Swamp Site in Attleboro, Massachusetts Pursuant to Section 404(c) of the Clean Water Act" (May 13, 1986) ("Final Determination"), App. C 64a.

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No. 88-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN A. BERSANI, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The opinions below, jurisdiction of this Court, the statutory framework and the facts of this case are set forth in detail in petitioners' Petition. Those presentations are incorporated herein by reference.

INTEREST OF AMICUS CURIAE

The interests of the Chamber of Commerce of the United States (the "Chamber") in this matter are set forth in the accompanying Motion for Leave to File Brief as Amicus Curiae.

SUMMARY OF ARGUMENT

Section 404 of the Clean Water Act, 33 U.S.C. § 1344, App. E 111-12a, which regulates the discharge of dredged or fill material into the waters of the United States, sets forth discrete roles for EPA and the Corps in the 404 permit process. In this case, EPA exceeded the scope of its statutory authority and usurped the Corps' authority by unlawfully conducting its own *de novo* review, duplicating the Corps' review of petitioners' compliance with the applicable regulations. Not only did EPA exceed its authority by conducting this *de novo* review, but in that unlawful process EPA also adopted and applied to petitioners a *post hoc* rule — the "market entry" test — in utter disregard of its own regulations and the APA. In so doing, EPA subjected petitioners to a fundamentally unfair process and violated petitioners' due process rights. Moreover, EPA's *post hoc* market entry test is commercially unworkable and threatens the ability of small and medium-sized companies to compete in the development industry. For these reasons, the Petition for a Writ of Certiorari should be granted.

ARGUMENT

I. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE EPA EXCEEDED ITS STATUTORY AUTHORITY BY ENGAGING IN A *DE NOVO* REVIEW OF COMPLIANCE WITH THE 404(b)(1) GUIDELINES

In its Final Determination in this matter, EPA concluded that a permit should not issue to petitioners for the discharge of fill material at Sweedens Swamp because the discharge would result in unacceptable *adverse* effects on wildlife. *See* section 404(c), 33 U.S.C. § 1344(c), App. E 111-12a; Final Determination at 12 ("F.D. at ___"), App. C 82a. Because the applicable standard in section 404(c) requires a finding not

merely of adverse effects, but of "unacceptable" adverse effects, EPA declared:

> In determining whether these adverse impacts are unacceptable, it is relevant to examine next the avoidability of this wetland loss by reviewing whether there are *practicable,* less environmentally damaging *alternatives* to the proposed project.

F.D. at 13, App. C 83a.

In conducting its own practicable alternatives analysis, EPA concluded, contrary to the Corps, that a practicable alternative had been available to petitioners before July 1983. EPA's conclusion is based on its guess at "market custom" (and not based on anything in the record) that petitioners must have "entered the market" before July 1983, when the alternative site became unavailable to petitioners. F.D. at 22-23, App. C 95-96a. EPA concluded that because an alternative had been available to petitioners, the adverse effects on wildlife were avoidable and, therefore, unacceptable within the meaning of section 404(c). F.D. at 31, App. C 107-08a.

The district court upheld EPA's Final Determination, *Bersani v. EPA,* 674 F. Supp. 405 (N.D.N.Y. 1987), App. B 31a, deferring to EPA's interpretation of the regulation, and holding that its "carefully circumscribed" function was to "uphold a reasonable [EPA] interpretation, even if the court would not have reached the same conclusion in the first instance." 674 F. Supp. at 412, App. B 45a. The United States Court of Appeals for the Second Circuit ("Second Circuit"), with the Chief Judge dissenting, affirmed the district court, holding that the "market entry" theory was a reasonable interpretation of the regulations. *Bersani v. Robichaud,* 850 F.2d 36, 45 (2d Cir. 1988), App. A 22a.

EPA's Final Determination and the lower courts' decisions upholding EPA's action are inconsistent with the express language of the statute which establishes discrete and separate roles for the two executive agencies charged with the responsibility to administer the section 404 program.[1] As such, they reject the section 404 permitting scheme designed by Congress.[2] Their analyses also shift the burden of proof under

[1] Section 404 of the Clean Water Act establishes a logical permit process under which the two executive agencies involved in the administration of the program are assigned discrete and non-duplicative roles. 33 U.S.C. § 1344, App. E 111a. The Corps — the permitting agency — is required upon application to conduct a broad-based review applying the standards in the 404(b)(1) Guidelines and those in the "public interest review."

If the Corps determines, based on its first level review, that a permit should not issue, it must, in appropriate cases, conduct a more narrow and focused review to determine whether the economic impact on navigation and anchorage of not issuing a permit for the particular project outweighs the harmful effects identified under its overall review which normally would justify a denial. If the Corps determines that the economic impact is substantial, it may override the denial of a permit. 33 U.S.C. § 1344(b)(2), App. E 111a.

Finally, EPA is authorized under section 404(c) to veto a permit even if the project is in compliance with the 404(b)(1) Guidelines and is in the public interest. To invoke this authority, however, EPA must first determine that certain statutorily identified critical resources exist at the proposed site and the adverse effect on one or more of these resources from the proposed activity is unacceptable. EPA's burden here is narrow and focused; it implicates only the particular resource and the particular site in question. Only a finding that the loss from the proposed activity would be unacceptable (major, important, or consequential and one the environment cannot do without) justifies a permit veto. 33 U.S.C. § 1344(c), App. E 111-12a; 44 Fed. Reg. 58076, 58078 (1979).

In fact, EPA has expressly recognized that the statute vests the Corps with exclusive authority to apply the section 404(b)(1) Guidelines. *See* Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. 186 (1985) ("The [404(b)(1)] Guidelines, developed by EPA in conjunction with the Corps, contain the substantive environmental criteria which must be met in order for a permit to be issued. EPA advises the Corps on whether or not discharges comply with the Guidelines; however, with respect to its own permit actions *the ultimate decision on compliance belongs to the Corps*") (statement of Richard E. Sanderson, Acting Asst. Admin. for External Affairs, U.S. Environmental Protection Agency) (emphasis added)).

404(c) from EPA to the permit applicant. In effect, under EPA's and the courts' analyses, the applicant must disprove that the adverse effects are unacceptable rather than EPA demonstrating that they are. If left in effect, these decisions open the floodgates for a tremendous bureaucracy destined to burden the permit process and delay projects into extinction.[3] This Court should grant the Petition for Certiorari in order to correct this administrative overreaching and reinstate the clear intent of Congress.

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[2] The legislative history supports the proposition that the 404(b)(1) Guidelines are to be applied solely by the Corps. In granting veto power to EPA under section 404(c), Congress noted:

> The decision is *not duplicative* or cumbersome because the permit application transmitted [by the Corps] to [EPA] for review will set forth the . . . *site* to be used. . . . The Conferees expect [EPA] to be expeditious in [its] determination as to whether a *site* is acceptable. . . .

1972 Legis. Hist., Vol. 1 at 177 (emphasis added). Thus, Congress clearly specified that EPA's review was to be a site-specific analysis in which alternative locations (already considered by the Corps) were not a factor.

[3] The legislative history of the Act demonstrates Congressional intent to avoid unnecessary regulation and red tape, 1977 Legis. Hist., Vol. 4 at 708, and to avoid creating "a burdensome bureaucracy in light of the fact that a system [operated by the Corps] to issue permits already existed," 1972 Legis. Hist., Vol. 1 at 177. As Sen. Bartlett noted during debate on the 1977 amendments to the Clean Water Act:

> Delays can be ill-afforded . . . . Business decisions are made on the basis of a number of tangible and intangible considerations . . . . Lengthy delays detrimentally affect the business planning which has become increasingly imperative in complex business . . . .

1977 Legis. Hist., Vol. 4 at 942. *Accord Sierra Club v. Sigler,* 695 F.2d 957, 981 (5th Cir. 1983) (protracted proceedings in environmental cases "can kill projects by delay").

Petitioners originally applied for their permit in September 1984. After careful review and after considering the advice of EPA, the Corps approved the permit in June 1985. EPA then initiated a 404(c) review, but rather than confining its review to the criteria set forth in 404(c), it duplicated the Corps' practicable alternatives analysis and, based on the exact same regulation and set of facts, reached a contrary conclusion nearly one year later, F.D. at 2, App. C 66a. Such administrative delay is precisely the type of bureaucratic duplication and deterrence which Congress sought to avoid. 1977 Legis. Hist., Vol. 4 at 942.

II. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE EPA VIOLATED DUE PROCESS IN ANNOUNCING THE MARKET ENTRY TEST AND THIS COURT SHOULD NOT CONDONE SUCH AGENCY ACTION

In this case, EPA conducted the *de novo* "practicable alternatives" analysis unlawfully in that it adopted a new standard and rule regarding the availability of alternatives. EPA drastically and unlawfully changed the applicable standard for determining when a "practicable alternative" exists under the 404(b)(1) Guidelines, from one of present availability to one of historic or "market entry" availability. F.D. at 21 n.14-15, 22, App. C 93-95a.

The adoption and application of the new rule violated EPA's own regulations and the APA.[4] This conduct is contrary to law and resulted in a denial of petitioners' due process.[5] EPA's action was therefore void and unenforceable.[6]

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[4] The 404(b)(1) Guidelines provide:

> No modifications to the basic *application, meaning,* or *intent* of these Guidelines will be made without rulemaking by the Administrator under the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*).

40 C.F.R. § 230.2(c) (emphasis added).

[5] Failure of an agency to follow its own regulations constitutes a violation of due process. *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954).

Further, The APA was "designed to provide guarantees of due process in administrative procedures." Administrative Procedure Act: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 298 (1946). *See Morton v. Ruiz,* 415 U.S. 199, 232 (1974); *Hill v. Federal Power Comm'n,* 335 F.2d 355 (5th Cir. 1964) (hearing unfair where standards applied had not evolved or been announced until agency decision held them unsatisfied).

[6] It is settled law that an agency's failure to follow its own regulation is unlawful and unenforceable. *Vitarelli v. Seaton,* 359 U.S. 535, 539 (1959); *Service v. Dulles,* 354 U.S. 363, 379-80 (1957).

Similarly, it is well-established that substantive or legislative rules adopted without the notice and comment procedures of the APA are void and unenforceable. *Shell Oil Co. v. Federal Energy Admin.,* 574 F.2d 512, 516

(Continued on page 7)

Had EPA applied the lawful standards to petitioners' project, EPA would have found, as the Corps did and as the record below demonstrates, that there were no practicable alternatives to petitioners' proposed project and, accordingly, no basis for vetoing petitioners' permit on the ground that the project was "avoidable." *See* "Views of the Chiefs of Engineers [Corps]," at p. 6 (May 31, 1985).

The 404(b)(1) Guidelines[7] provide that a permit will not be issued "if there *is* a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem . . . ." 40 C.F.R. § 230.10(a), App. F 113-14a (emphasis added). The test clearly is written in and applies only to the present tense. It is self evident that "is available" does not mean "*ever was* available" as the market entry test requires.[8]

The regulation requires the applicant to demonstrate in his permit application that there are no practicable alternatives to his proposed project. The regulation does not require an applicant to be aware of all alternatives at the moment the applicant entered the market (whenever that was) and to purchase immediately such properties. Applying this arbitrary market entry standard to petitioners is unlawful not only

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(Continued from page 6)

(Temp. Emer. Ct. App. 1978) ("A plethora of cases hold that an administrative rule which is not promulgated in accordance with [rulemaking] procedures is void") (citing *New York v. Diamond*, 379 F. Supp. 503, 516 (S.D.N.Y. 1974)).

The United States District Court for the Eastern District of Virginia, in *Tabb Lakes, Ltd. v. United States*, Civil Action No. 87-635-N (E.D. Va. Nov. 7, 1988), recently set aside Corps action in a section 404 permit proceeding because the Corps failed to comply with the rulemaking requirements of the APA.

[7] These Guidelines were promulgated in 1980, 45 Fed. Reg. 85344 (1980), and have remained unchanged since that time. Moreover, neither EPA nor the Corps in thousands of permit decisions since that time has ever applied a market entry test for determining whether a practicable alternative existed.

[8] This Court, in *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, _____ U.S. _____, 108 S. Ct. 376, 381 (1987), recently held that plainly present-tense language should not be converted to the past tense.

because it is extraordinarily vague, but because it did not even exist when petitioners applied for a permit.[9]

The courts which have reviewed the availability of practicable alternatives have uniformly considered current availability only and have not looked to the past availability of alternatives.[10] Further, EPA in prior 404(c) decisions, never as much as suggested, much less held, that alternatives which are not presently available may be deemed "practicable alternatives," based upon purported availability at some undefined time when the applicant was claimed to have entered the market.

The Court should grant the Petition for Certiorari in order to correct the excessive agency action in this case. EPA

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[9] In addition, EPA has announced this very complex, administratively difficult market entry concept without benefit of public participation, as contemplated by the Guidelines and the APA. The rulemaking procedures under the APA were designed in part to "communicate information, concerns, and criticisms to the agency . . . ." *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir.), *cert. denied*, 459 U.S. 835 (1982). In this manner, the agency, through the APA procedures, would have an opportunity to educate itself before establishing rules which have a substantial impact on those regulated. *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478 (2d Cir. 1972). The "market entry" standard has not withstood the test of critical public scrutiny. As a result, EPA has not fully contemplated or analyzed the extreme practical difficulties of compliance with the administration of its new standard. In order to supply the agency with this vital information, APA rulemaking is absolutely necessary.

[10] *See Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986); *Louisiana Wildlife Federation, Inc. v. York*, 603 F. Supp. 518 (W.D. La. 1984), *aff'd in part, vacated on other grounds and remanded*, 761 F.2d 1044 (5th Cir. 1985); *Nat'l Audubon Society v. Hartz Mountain Dev. Corp.*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10724 (D.N.J. Oct. 24, 1983); *Hough v. Marsh*, 557 F. Supp. 74 (D. Mass. 1982). *See also* "Final Determination of the Administrator Concerning M.A. Norden Site Pursuant to Section 404(c) of the Clean Water Act" (June 15, 1984) at 10-11; "Final Determination of the Assistant Administrator for External Affairs Concerning the Jack Maybank Site on Jehossee Island, South Carolina Pursuant to Section 404(c) of the Clean Water Act" (April 5, 1985) at 11-12 (EPA considered only one alternative which was currently available to, and in fact owned by, the applicant).

publishes regulations and interpretative determinations on a daily basis which significantly affect the rights and obligations of individuals. Unless the Court reverses EPA's decision, this matter will have a long term, chilling effect on the development industry and will most severely affect small and medium-sized companies, unable to risk capital on uncertain agency behavior.

III. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE MARKET ENTRY TEST IS COMMERCIALLY UNWORKABLE

For a number of reasons, the "market entry" test is impractical and commercially unworkable. In fact, the test is so extraordinarily vague and amorphous as to supply no standard whatsoever. When does "market entry" occur? At the time the applicant first reviews census data for market potential; when the applicant first investigates the area to determine its suitability for its project; when the applicant's first employee visits the area; or at some other time? It will be impossible for an applicant to define when "market entry" has occurred. Thus, the standard injects a high degree of uncertainty into the section 404 permit process. Moreover, an applicant cannot possibly know all alternatives available at the time of "market entry."

This new vagueness exacerbates the already difficult problem of determining whether a particular tract of property is a "wetland" as contemplated by the Act. *See, e.g., United States v. Riverside Bayview Homes,* 474 U.S. 121 (1985). Frequently a property's status as a protected wetland is not clear and can be ascertained only through careful and expensive analysis. Thus, it is not always readily apparent whether a property owner must apply for a permit before altering his property, much less whether he must have considered all non-wetland alternatives prior to purchasing it, regardless if that was six months or six years or sixty years ago. For small and medium-sized companies, such a high degree of uncertainty is fatal to those companies' ability to compete in the development industry.

CONCLUSION

EPA's action and the Second Circuit's affirmance of that action are contrary to section 404 of the Act and in violation of due process. These actions create significant uncertainty and confusion for all companies, particularly small and medium-sized companies interested in developing their land. Accordingly, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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NO. 88-902

In the
Supreme Court of the United States
OCTOBER TERM, 1988

JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL AND THE PYRAMID COMPANIES,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

AND

No. 88-929

JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE LOUISIANA LANDOWNERS ASSOCIATION, INC. FOR LEAVE TO FILE THE ATTACHED BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

No. 88-902

JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL AND THE PYRAMID COMPANIES,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

AND

No. 88-929

JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE LOUISIANA LANDOWNERS ASSOCIATION, INC. FOR LEAVE TO FILE THE ATTACHED BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

The Louisiana Landowners Association, Inc. ("LLA") respectfully moves the Court for leave to file the attached brief *amicus curiae* in support of the petition of John A. Bersani, Newport Galleria Group, Robert J. Congel and the Pyramid Companies and the petition of Joseph Robichaud and Citizens in Support of Attleboro Mall for writs of certiorari to the United States Court of Appeals for the Second Circuit. The LLA has received consent to the filing of this

brief from petitioners, from the respondent United States, and from intervenor - appellants below, Joseph Robichaud and Citizens in Support of Attleboro Mall. Intervenor - appellees below, the environmental groups listed in the certificate of service filed by the clerk, have declined to grant consent. This brief is timely filed within the extension of time granted to respondents until January 27, 1989 in which to file their opposition to the petitions for certiorari.

The LLA is an association composed of approximately 500 landowners in the State of Louisiana. It is the principal landowners association in the State which has been organized for the purpose of representing and protecting the interests and property rights of its members.

The involvement of LLA members in the permit process under Sec. 404 of the Clean Water Act ("CWA"), 33 U.S.C. 1344, is extensive. The wetland basins of Louisiana comprise about 25% of the total wetlands of the United States. See Randall A. Fish, "The Coastal Wetlands Environmental Levy: An Analysis Under the Commerce and Supremacy Clauses," 29 *Loy. L. Rev.* 153, 154 (1982); and Ralph W. Tiner, Jr., 'Wetlands of the United States: Current Status and Recent Trends," National Wetlands Inventory, Department of the Interior, U. S. Fish and Wildlife Service (March 1984), p. 28, fig. 25. LLA members hold title to thousands of acres of land which have been - or may be - classified as "wetlands", either because the land is affected by tidal waters or because the land might arguably be considered "wetland" by either the U. S. Army Corps of Engineers ("COE") or the U. S. Environmental Protection Agency ("EPA") in the administration of the 404 permit program. The need to obtain a permit for uses of wetland property involving the discharge of dredged or fill material directly involves LLA members in this permit process. The LLA is vitally concerned that the 404 program be ad-

ministered in a sound and fair manner consistent with the balance between conservation and development intended by Congress in its passage of the CWA.

The Final Determination under review in this case represents a dramatic departure from the authority granted EPA in Sec. 404(c) of the CWA. EPA's "veto" of the permit which COE proposed to issue for construction of a shopping mall at Sweedens Swamp was based upon a flawed application of Sec. 404(c) and the guidelines developed by EPA, in conjunction with the COE, under Sec. 404(b)(1) of the CWA. Petitioners' request for a writ of certiorari should be granted to restore much-needed direction to a permit program that affects not only members of the LLA, but major planning and development interests on which the future growth of this country depends. In the attached *amicus curiae* brief, the LLA addresses the quandary and confusion now facing its members as a result of the ruling below; the need for EPA to have used rulemaking to announce its new "market entry" theory for determining the availability of "practical alternatives"; and EPA's failure to respect the limitations of Sec. 404(c) and its own regulations in making the crucial determination of "unacceptability" required by the statute. EPA's departure from the authorized scope of the 404 program is so widespread that it desperately calls for correction by this Court.

For the above reasons, the LLA respectfully submits that the Court should grant this Motion for leave to file the attached amicus curiae brief.

Respectfully submitted,

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January 18, 1989

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF THE LOUISIANA LANDOWNERS ASSOCIATION, INC. IN SUPPORT OF PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

I.

INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* is set forth in the preceding motion for leave to file this brief.

II.

STATEMENT OF THE CASE

The Louisiana Landowners Association, Inc. ("LLA") adopts the Statement of the Case in the petition filed by petitioners Bersani, *et al.*

III.

ARGUMENT

This case raises fundamental issues relating to the exercise of EPA's "veto" authority under Sec. 404(c) of the Clean Water Act ("CWA"), 33 U.S.C. 1344(c). In the Final Determination under review in this case, EPA went far beyond the limits of the statute, and action by this Court is necessary to stop the agency error before it goes further.

A. The Petition for Certiorari Should be Granted Because EPA's Market Entry Theory Provides No Guidance to Affected Landowners and is Impossible to Apply.

The petition for certiorari of Bersani, *et al,* and the brief *amici curiae* submitted by the National Homebuilders Association, *et al,* point out in telling detail the absence of standards inherent in the market entry theory announced by EPA in this case, the lack of guidance which it provides to the regulated community, its conflict with planning and development processes in the real world, and its general unsuitability as a regulatory tool. In this amicus submission, the LLA shows that these uncertainties are compounded for landowners, large and small, who hold property with the thought and hope of future development. In the Final Determination, EPA concedes that it has no answers as to how its new market entry theory would apply to such landowners:

> The issue addressed here relates particularly to circumstances where a developer or developers are entering a market area for the accomplishment of a specific project. I need not, and do not decide here what the relevant time period would be in other circumstances - e.g., where an applicant wishes to build on property inherited or acquired long ago.

Petition of Bersani, *et al* for Writ of Certiorari, Appendix D, p. 93a, note 14.

This leaves the matter in hopeless confusion and presents a threatening "unknown" for owners of wetland properties who may envision a future use of their land. No guidance is given the landowner as to how the market entry theory may be applied to him, despite the fact that the Second Circuit Court of Appeals has declared that the market entry theory is the *only* reasonable interpretation of the regulations. *Bersani v. Robichaud*, 850 F.2d 36, 44 (2d Cir. 1988). The result is that landowners must wonder and guess at what will be required of them and face the risk of finding out only through a decision by EPA that they have not done enough. This is the dilemma that faced petitioners, who learned of the market entry theory only through EPA's decision that they had not satisfied it. This is fundamentally wrong and unfair. "[I]t is too late for an Agency to declare the standards to be met by its decision holding that they have not been met. . . ". *Hill v Federal Power Commission*, 335 F.2d 355, 356 (5th Cir. 1964). See, Also, *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

Certiorari should be granted to prevent EPA from using such an elusive and undiscernible standard against landowners and others in the regulated community.

B. The Petition for Certiorari Should be Granted Because EPA's New Market Entry Theory Has the Effect of a Rule But Was Announced Without Adherence to Rulemaking Proceedings.

The effect of the market entry theory announced for the first time in this case will be widespread. This is evident from the numerous petitions for leave to submit briefs *amici curiae* in support of the Bersani, *et al* petition for certiorari. The impact of EPA's Final Determination will be felt by planners, developers, port authorities, landowners, local and state governments and all other persons contemplating activities in wetlands. Such impact has been virtually assured by the Second Circuit's holding that the market entry theory is the *only* reasonable interpretation of the regulation to determine the availability of "practicable alternatives".

When agency action is of such general applicability and will have such substantive impact upon an entire regulated community who must thereafter comply, the agency is required to follow the notice and comment procedures for rulemaking specified in the Administrative Procedures Act, 5 U.S.C. 552, 553. This is especially true when the agency announces a new standard that departs from past construction of the regulation. *Knutzen v. Eben Ezer Lutheran Housing Center,* 815 F.2d 1343, 1351 (10th Cir. 1987); *NI Industries, Inc. v. U.S.,* 841 F.2d 1104, 1107 (Fed. Cir. 1988); *United States Department of Labor v. Kast Metals Corp.,* 744 F.2d 1145, 1149, (5th Cir. 1984); and *Appalachian Power Co. v. Train,* 566 F.2d 451, 455 (4th Cir. 1977).

Although EPA has some flexibility in determining whether to proceed by rulemaking or adjudication, when the results of its action amount to a "substantive rule", the

notice and comment procedures of the APA must be followed. *Morton v. Ruiz,* 415 U.S. 199, 231 - 233, 94 S.Ct. 1055, 1072 - 1073 (1974); and *N.L.R.B. v. Wyman-Gordon Co.,* 394 U.S. 759, 764 - 766, 89 S.Ct. 1426, 1429 (1969). Rulemaking in this case would have allowed affected persons to raise the myriad of questions about the market entry theory that have arisen and would have forced EPA to develop sound responses to these concerns or abandon the theory as impractical and unworkable. In either case, the regulatory process would have benefited and the regulatory community would know in advance the standards with which it must comply.

It is necessary that certiorari issue in this case to require EPA to follow the rulemaking procedures specified in the APA before adopting or attempting to apply the market entry theory.

C. The Petition for Certiorari Should be Granted Because EPA's "Unacceptability" Determination Failed to Make the Findings Required by Sec. 404(c).

EPA's Sec. 404(c) authority is limited. It can be exercised only upon a determination by EPA that a proposed discharge will have an "unacceptable adverse effect" on municipal water supplies, shellfish beds and fisheries (including spawning and breeding areas), wildlife or recreational areas. The key determination is one of "unacceptability".

This requires, first, a finding of adverse effects upon the environmental values listed in the statute and, secondly, a further determination of whether the impacts are "unacceptable". This involves a weighing and balancing of the impacts in light of such factors as the project purpose and need, the availability of practicable alternatives, the

significance of the environmental values at issue, the effectiveness of mitigation measure, and the "takings" implications of the agency action.*

In its 404(c) regulations, EPA has defined "unacceptable adverse effect" as involving only "*significant* degradation of municipal water supplies (including surface or groundwater) or *significant* loss of or damage to fisheries, shellfishing or wildlife habitat or recreation areas." (emphasis added). 40 C.F.R. 231.2(e). Sec. 404(c) is not concerned with "insignificant" effects. Section 404(c) is also not concerned with protecting *all* wetland areas. The 404(b)(1) guidelines recognize that waters of the United States "vary greatly" (44 *Fed. Reg.* 54222, September 18, 1979, and 45 *Fed. Reg.* 85336, December 24, 1980), and it is only "important" wetlands that are intended for 404 protection. See 33 C.F.R. 320.4(b) and *United States v. Riverside Bayview Homes, Inc.,* 106 S.Ct. 455, 463 n. 9 (1985). Section 404(c) is even more limited. It is to be used only when necessary to protect "critical areas." Legislative History of the Federal Water Pollution Control Act of 1972, Vol. 1 at 236 and 816 (Comm. Print 1973). If a wetland is not of "critical importance" to the aquatic ecosystem, it is not a fit subject of Sec. 404(c).

To sustain a veto under Sec. 404(c), EPA must have before it wetlands of critical importance to the aquatic environment whose destruction will result in significant and unacceptable adverse effects upon one of the values listed in the statute. Such findings are missing from the Final

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* On March 15, 1988, President Ronald Reagan affirmed the need for federal agencies to consider the "takings" implications of their actions - especially in light of the recent decisions of this Court in *Nollan v. California Coastal Commission,* 107 S.Ct. 3141 (1987) and *First English Evangelical Lutheran Church v. Los Angeles County,* 107 S.Ct. 2378 (1987) - in his signing of Executive Order 12630.

Determination. There is nothing to indicate that Sweedens Swamp is a "critical area", nor is there any question of adverse impacts upon municipal water supplies, shellfish beds or fisheries (including spawning and breeding areas), or recreational areas. There are only passing references to significant habitat values which are in stark contrast to EPA's characterization of Sweedens Swamp as an "ordinary swamp" (Bersani, *et al*, Petition, Appendix D. p. 67a) which ". . .is neither a unique wetland nor habitat for endangered species." (*Id.* at 76a).

The crux of EPA's veto was that "practicable alternatives" were available to petitioners even if there was no significant degradation. (*Id.* at 67a-68a.) Under Sec. 404(c), however, this is not enough. A finding of "significance" and "unacceptable degradation" is the touchstone of the statute. Moreover, EPA's "practicable alternatives" analysis was itself skewed, based as it was upon an arbitrary and standardless "market entry" theory. The analysis was further flawed by EPA's impermissible shifting of the burden of proof to petitioners to prove that practicable alternatives were not available. This was done when EPA applied 40 C.F.R. 230.10(a)(3) of the 404(b)(1) guidelines, which presumes that less damaging practicable alternatives are available for non water-dependent activities, to the 404(c) determination. EPA itself has recognized, in the Preamble to the 404(b)(1) guidelines, that ". . .[i]f the Administrator uses his 404(c) 'veto', then he does have the burden to justify his action, but that burden does not come into play until he begins a 404(c) proceeding (See, 40 C.F.R Part 231)." (45 *Fed. Reg.* 85338, December 24, 1980).

In the Final Determination, EPA also disregarded the good faith project investment made by petitioners on the basis of COE's past construction of the practicable

alternatives requirement, COE's finding of compliance with the 404(b)(1) guidelines, the project approval given by the State of Massachusetts, and COE's judgment as to the sufficiency of the mitigation measures agreed to by petitioners. EPA further exceeded its authority in considering the cumulative loss of wetlands in other areas of the State when it found that Sweedens Swamp was "an isolated or 'island' wildlife habitat." (*Id.* at 74a). Wetland losses in other areas can not be considered without an ecological connection to the swamp and can not make up for a lack of significant unacceptable effects upon the swamp site itself.

If allowed to stand, the Final Determination would allow EPA to establish a virtual "standing veto" whenever there are *any* adverse effects on the most ordinary of wetlands. This is not the standard of Sec. 404(c). It disregards the limitations of the statute, the provisions of the regulations, and the serious and impartial weighing and balancing of factors inherent in the determinations of "unacceptability" and "significance".

Certiorari should be granted to set aside EPA's disregard of the limitations upon its authority under Sec. 404(c).

CONCLUSION

For the reasons stated above, the LLA submits that the Court should issue a writ of certiorari to review the judgment and opinion of the Second Circuit Court of Appeals.

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0338Q
January 18, 1989

CERTIFICATE OF SERVICE

The undersigned member of the Bar of this Court hereby certifies that the foregoing motion for leave to file amicus brief, and attached amicus brief, has been served upon all parties required to be served by depositing copies of the motion and brief in the United States mail, with first-class postage prepaid, addressed to the following counsel of record:

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This motion of Pacific Legal Foundation (PLF), Resource Development Council for Alaska, Inc. (RDC), California Chamber of Commerce (CCC), and California Farm Bureau Federation (CFBF) to file the annexed amicus curiae brief is respectfully made pursuant to Supreme Court Rule 36.

Consent to the filing of this brief has been granted by all parties except for respondents, Sierra Club, *et al.* Copies of consent letters have been lodged with the Clerk of this Court.

INTERESTS OF AMICI CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has litigated numerous public interest cases which involve environmental issues in general and the interpretation of the Clean Water Act (CWA) in particular. PLF policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board authorizes active PLF involvement in a case only when there is broad community support. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

RDC is a nonprofit organization made up of thousands of Alaskans and Alaska business associations, labor unions, native regional and village corporations, and 26 local government units. All of these interests have come together to work for the responsible development of Alaska. RDC deals with a variety of issues that are

important to the economic prosperity of Alaska and recognizes that one of the most formidable roadblocks to development in Alaska is the federal government's land use policies and regulations. RDC has participated in numerous lawsuits and countless administrative hearings on land use and development in Alaska. RDC has a very distinctive perspective on the Environmental Protection Agency's (EPA) interpretation of 40 C.F.R. § 230.10(a) (1987), regarding the market entry theory for implementation of the practicable alternatives test. This theory was approved by the court below. In Alaska almost all of the land would be covered by only two market entry dates: (1) 1958, the year of statehood when the state government began selecting its 104 million acres from Alaska's total land area of 375 million acres, and (2) 1971, when Congress settled the long contested rights of Alaska Natives by granting them the right to select 44 million acres of federal land in Alaska. Prior to those dates the federal government owned over 99% of Alaska. RDC strongly believes the market entry theory, as interpreted by EPA, could end responsible development in Alaska inasmuch as over 70% of Alaska is wetland by EPA's definition. The lower appellate court's sanction of EPA's market entry theory will have a devastating impact on Alaska which RDC believes was never intended by Congress in passing the Clean Water Act.

The California Farm Bureau Federation is a volunteer, nongovernmental, nonprofit, California corporation. Its primary purpose is to protect and foster agricultural interests throughout the State of California. Its members consist of 52 county farm bureaus, with a combined membership at the close of its 1984 membership year of

approximately 98,000 farm families. Over 85% of all commercial farmers in the State of California are members of county farm bureaus. Members, many of whom farm and/or raise cattle throughout the United States and engage in wetlands agriculture will be negatively affected by EPA's market entry theory. The theory will reduce the acreage available for new crop production and will undoubtedly impinge upon the farm and ranch management decisions regarding what crops to plant, when to plant them, and where to plant them.

The California Chamber of Commerce is a broad-based, nonprofit organization through which business, industry, and agriculture join forces to work for positive action on key legislative, regulatory, and legal issues affecting California's economic and job climate. Chamber positions on issues are set by a board of directors, based on recommendations from statewide committees and task forces. Committee and task force members are volunteers with an interest or expertise in the subject. The chamber's members who are developers as well as the members who are farmers and ranchers will be negatively impacted by EPA's market entry theory. It establishes a standardless inquiry that virtually invites arbitrary and unequal application, and makes no sense in the real world of land use planning, financing, and development. If the market entry theory is not overturned by this Court, the chamber's members will be significantly and negatively impacted.

NEED FOR ADDITIONAL ARGUMENT

The Second Circuit Court of Appeals has rendered an interpretation of 40 C.F.R. § 230.10(a), implementing

Section 404 of the Clean Water Act, which not only fails to fulfill the statute's main purpose, but also severely and unnecessarily impacts development and agricultural interests nationwide. This interpretation called the market entry theory, has been discussed so far in an isolated, sterilized manner without a true indication of its potentially broad precedential impact. It is necessary for this Court to recognize how broad the impact of this decision may be in order to understand how it seriously conflicts with the purposes of the Clean Water Act. Unless the amici curiae applicants are permitted to file the annexed brief, it is unlikely that these critical precedential impacts will be brought to the attention of the Court.

For these forgoing reasons, Pacific Legal Foundation, RDC, CCC, and CFBF request that this motion to file the annexed amicus curiae brief be granted.

DATED: January 3, 1989.

Respectfully submitted,

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Nos. 88-902 and 88-929

In The

Supreme Court of the United States

October Term, 1988

JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL, and the PYRAMID COMPANIES,

v. *Petitioners,*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL,

v. *Petitioners,*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION, RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., CALIFORNIA CHAMBER OF COMMERCE, AND CALIFORNIA FARM BUREAU FEDERATION

INTERESTS OF AMICI

The interests of amici curiae are set forth in the preceding motion for leave to file this brief.

OPINIONS BELOW

The opinion of the United States Court of Appeals is cited as *Bersani v. Robichaud*, 850 F.2d 36 (2d Cir. 1988).

STATEMENT OF THE CASE

John A. Bersani and the Pyramid Companies (Pyramid) began to search for a shopping center site in the Attleboro, Massachusetts, area in September, 1983. They found an undeveloped site owned by the Edward J. DeBartolo Corporation (DeBartolo), another shopping center developer, who had purchased the site in April, 1982. On the site are wetlands known as Sweedens Swamp. DeBartolo undertook to develop the site and had applied to the Massachusetts Department of Environmental Quality Engineering (DEQE) for a state wetlands permit, but it was denied in April, 1982. Pyramid acquired the site from DeBartolo in December, 1983, and proceeded to obtain all permits necessary to build except for the Section 404 dredge and fill permit. Although DEQE's permit standards were modified in April, 1983, Pyramid was able to obtain the state wetlands permit under the previous standards, apparently benefiting fortuitously from the fact that DeBartolo had initiated the state wetlands permit process prior to the changes.

When Pyramid sought its Section 404 permit it was faced with its last regulatory hurdle. It has found this hurdle virtually unscalable. The Army Corps of Engineers (Corps) applied the Section 404(b)(1) guidelines (40 C.F.R. § 230) and public interest review regulations (33 C.F.R. § 320.4 (1987)) and found the project met all requirements for a Section 404 permit. As part of the analysis the Corps had found that 40 C.F.R. § 230.10(a) was satisfied. This regulation, providing the critical issue in this case, forbids the Corps from issuing a permit if a "practicable alternative" *is* available to the applicant that "would have less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a). The only other shopping mall site in Attleboro had been optioned by another mall developer (New England Development Company (NED)) on July 1, 1983, eliminating the last practicable alternative.

The Corps notified EPA on June 28, 1985, of its intentions to issue the permit. In response EPA determined that Pyramid had not complied with the practicable alternatives requirement of 40 C.F.R. § 230.10(a), and blocked the permit. It made this finding by inventing a new "market entry theory" for the regulation. Rather than considering practicable alternatives available at the time of the Section 404 permit was applied for, EPA changed this long-standing practice of the Corps and determined availability should be considered as of the time the applicant "entered the market." EPA then ruled that Pyramid must have entered the market before NED optioned the alternate mall site and therefore regardless of the wetlands mitigation measures agreed to by Pyramid, measures which would have created a significantly more

valuable wetland area, Pyramid was not entitled to its Section 404 permit. This litigation followed.

SUMMARY OF ARGUMENT

The purpose of Section 404 of the Clean Water Act which is to clean up the nation's water is circumvented by EPA's interpretation of 40 C.F.R. § 230.10(a). This regulation requires the Corps of Engineers to deny a Section 404 permit if practicable alternatives to a project exist which will have less impact on the aquatic ecosystem. EPA has created a market entry theory in analyzing whether "practicable alternatives" to the proposed project exist. This theory establishes an amorphous standard which is not only arbitrary and fails to further the goals of the Clean Water Act, but also severely impacts private property rights. None of these results were intended by Congress.

INTRODUCTION

This case involves an issue far more important than one developer trying to cope with one federal agency's overzealous, arbitrary enforcement of its regulations. Rather, it involves the fate of farmers, ranchers, miners, and developers throughout the nation who are being harmed by a federal agency and who will be injured even further if EPA's "market entry theory" for implementation of 40 C.F.R. § 230.10(a), as sanctioned by the Second Circuit, is allowed to stand. EPA has crossed a line drawn by Congress designed to balance the biological integrity

of a specific wetland area against productive development advantages that a site would provide. *See Bersani v. Robichaud*, 850 F.2d at 48 (Pratt, J., dissenting). Instead of focusing on effects of developing wetlands and significant mitigation measures which could be required of the developer to insure that on balance wetlands are preserved and maintained, EPA has focused on who is doing the developing. This focus is the unfair and arbitrary result of the market entry theory, whereby the particular land which is the subject of the Section 404 permit application is not examined but the party who wishes to develop the land is. The result has nothing to do with maintaining the biological integrity of the nation's waters and is completely contrary to the intent of the Clean Water Act.

ARGUMENT

I

THE MARKET ENTRY THEORY INTERPRETATION OF 40 C.F.R. § 230.10(a) CONFLICTS WITH SECTION 404 OF THE CLEAN WATER ACT

A. The Purpose of the Clean Water Act Is to Clean Up the Nation's Waters

"Section 404 of the Clean Water Act was enacted 'to restore and maintain the chemical, physical, and biological integrity of the nation's waters.' 33 U.S.C. § 1251(a) (1976) (Section entitled Congressional Declaration of Goals and Policy)." *Buttrey v. United States*, 690 F.2d 1170, 1180 (5th Cir. 1982), *cert denied*, 461 U.S. 927 (1983). *See also* 3 Legislative History of the Clean Water Act of

1977, 95th Cong., 2nd Sess. 532 (1978). This purpose in mind, it is clear that "EPA went wrong–seriously wrong–when it adopted the market entry theory to decide whether an alternate development site was available. By focusing on the decision making techniques and tactics of a particular developer instead of the actual alternatives to disturbing the wetland, EPA ignored the statute's (Clean Water Act) central purpose." *Bersani*, 850 F.2d at 48 (Pratt, J., dissenting). That purpose of course is to protect the biological integrity of the nation's waters and not to guard against decision making techniques and tactics of property owners.

B. Section 404 of the Clean Water Act Allows Discharge of Filled or Dredged Material into the Nation's Waters if There Is No Unacceptable Adverse Effect on the Environment

Section 404(a) of the Clean Water Act authorizes the Secretary of Army, acting through the Corps of Engineers, to issue permits for the discharge of dredged or fill materials. 33 U.S.C. § 1344(a) (1982). Section 404(b) provides that the Corps must base its decisions regarding permits on guidelines to be developed in concert between EPA and the Secretary of Army (meaning the Corps of Engineers). 33 U.S.C. § 1344(b). 40 C.F.R. § 230.10(a) is part of the Section 404(b)(1) guidelines and covers non-water dependent activities. These are activities that could be performed on nonwetlands sites just as successfully as on wetlands sites. This section reads, at Subsection (a):

> "Except as provided under Section 402(b)(2), no discharge of dredged or fill material shall be permitted if there *is* a practicable alternative to the proposed discharge which would have less adverse impact on

> the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." (Emphasis added.)

Subsection (a)(2) states that

> "an alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered."

Subsection (a)(3) goes on to indicate that a site is to be presumed available if the activity proposed could occur on uplands just as well as it could on wetlands unless the applicant clearly demonstrates otherwise. The subsection also presumes that activities on upland sites have less adverse impact on the aquatic ecosystem unless it is also clearly demonstrated otherwise.

C. EPA's Finding of the Unacceptable Adverse Impact Is Not Supported by the Record

EPA of course engaged in a practicable alternatives analysis of the Attleboro Mall site pursuant to 40 C.F.R. § 230.10(a). EPA determined that a practicable alternative did exist and therefore it naturally followed that an unacceptable adverse effect on the environment, and in particular wildlife, per the criteria of 40 C.F.R. § 231.2(e) existed. Accordingly, EPA vetoed the 404 permit pursuant to its Section 404(c) veto authority. *See Bersani*, 850 F.2d at 40. EPA's articulation that its veto was due to an unacceptable risk on wildlife was clearly an attempt to

justify its veto by bringing it within the confines of its jurisdictional authority. However, the record discloses that the only basis for EPA's decision to deny the permit was "(1) the avoidability of the loss of wildlife habitat (meaning only that there was a practicable alternative), and (2) the significance of such areas in Massachusetts (meaning that the cumulative impact of this loss and losses at other unrelated wetland sites, far away from Sweedens Swamp, was an important factor in denying their permit)."[1] Robichaud's Petition for Writ of Certiorari at 6. Thus, by invoking the market entry theory to the practicable alternatives analysis of Section 230.10(a) EPA and the Second Circuit read out of the regulation not only its commonsense meaning but also eliminated other considerations to be evaluated during the permit process. First, they lost sight of the regulation's plain meaning that the Corps is to determine whether there *is* a practicable alternative, not whether there was or will be. Second they read out of the regulation its requirements to balance permit decisions on a number of environmental and

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[1] On the same date that Bersani filed his petition for writ of certiorari, Joe Robichaud and Citizens in Support of Attleboro Mall filed a similar petition of writ for certiorari. Robichaud argues that EPA has exceeded its Section 404(c) statutory authority when it vetoed the Attleboro Mall Section 404 fill permit on the basis of the cumulative loss of wetlands regionally or nationwide, rather than basing its decision on the environmental effects at the specific proposed site in question. Amici curiae fully support the position of petitioner, Robichaud, *et al.*, and adopts Robichaud's argument concerning the limits to which the EPA administrator can consider cumulative impacts when making a Section 404(c) veto.

other factors. 40 C.F.R. § 230; 33 C.F.R. § 320.4. Instead, as Judge Pratt stated: "[T]he market entry theory in effect taints a particular developer with respect to a particular site, while ignoring the crucial question of whether the site itself should be preserved." Instead of considering the significant environmental and economic and social benefits that would occur were the Pyramid partners able to go forward with Attleboro Mall, EPA established a brand new test for finding an unacceptable adverse impact.

D. EPA's Market Entry Theory Provides No Meaningful Standard

EPA established a new test for "practicable alternatives" which fails to provide any meaningful standard. The test may be that if, at any time during your ownership of a particular property or during the ownership of the property by your predecessor assuming some form of privity between you and that previous owner, there was some available, practicable alternative site to the one you now propose to develop, you categorically are not entitled to a Section 404 permit. Could this be the standard? Possibly, since the Court did say that since the North Attleboro site indisputably was "available when Pyramid's predecessor, DeBartolo, purchased Sweedens Swamp, one might argue, as EPA does, that Pyramid should be held to stand in its predecessor's shoes." *Bersani*, 850 F.2d at 41. But the court intimated as well that this may *not* be the standard. In trying to pin the standard down Pyramid asked a series of questions. Is the developer to seek alternative sites from the time of the first internal memorandum on a proposal to develop,

or when you first hire your land use consultant, or when you begin to negotiate for a particular site? *See Bersani*, 850 F.2d at 46. The court responded to those inquiries from *Pyramid* by stating "we are persuaded, however, that EPA is correct in asserting that it is unnecessary to pin down the standard to such a degree and that it would confuse things further to attempt to do so." *Bersani*, 850 F.2d at 46. To the contrary, what has been created is not an objective, fair standard, but an amorphous guideline under which no property owner's or developer can be certain as to whether or not he is complying with Section 230.10(a). Such a standard completely violates all precepts of fairness and property owners' due process rights. *See Morton v. Ruiz*, 415 U.S. 199 (1974).

E. The Market Entry Theory Fails to Protect the Nation's Water and Wetlands, and in Fact Ignores This Factor

The Second Circuit majority sees no problem in their market theory because it believes that the critical purpose of Section 404 is to provide an incentive to avoid developing in wetlands areas. The court reasoned that to choose some objective standard for delineating when the practicable alternatives test should be applied would not provide this incentive. But as the dissent aptly pointed out, Section 404 of the Clean Water Act is not a punitive section. It is not to provide an incentive to avoid choosing wetlands but rather the statute is directed towards maintaining the biological integrity of the nation's waters. To achieve this goal the statute calls for balancing the environmental and biological factors of the specific area against the economic, and social considerations of using

the site. *Bersani*, 850 F.2d at 40. With regard to the site at Sweedens Swamp, the area has been a degraded eyesore for years. As stated by petitioners, Robichaud, *et al.*, "Sweedens Swamp as it presently exists is a highly degraded, highly inefficient wetlands which fails to perform most of the ecological or recreational benefits which make wetlands worth preserving." Robichaud petition at 4. *Robichaud* carefully established the numerous benefits that would accrue to the environment as well as to the public at large were the project allowed to go forward. The petition cites at 4 the following:

> "In addition to extensive on-site mitigation, Pyramid informed the U.S. Army Corps of Engineers, the permitting authority, that it would construct over 35 acres of diverse, productive wetlands on an off-site parcel of land which presently is of very low ecological value. Thus, in addition to improving the wetland habitat which will be provided in the 26 acres of enhanced wetland which will remain after construction, Pyramid has agreed to create an *additional* 36 acres of wildlife habitation consisting of open water, marsh meadow, and shrub swamp.
>
> . . . .
>
> "The Corps found that Pyramid's off-site wetlands creation plans would result in a substantial improvement in overall wildlife habitat for the area. The Corps noted that Sweedens Swamp is a red maple swamp, a very common wildlife habitat in Massachusetts. By contrast the open water, marsh meadows and shrub swamp to be created by Pyramid is a relatively rare type of habitat in the Northeast. As a result, the off-site wetlands will attract animals whose presence in Massachusetts is limited severely by available habitat.
>
> "On balance, after exhaustively analyzing the degraded state of Sweedens Swamp and the millions

> of dollars of improvements to be made by Pyramid, both on-site and off-site, the Corps finally concluded that Pyramid's purported project would result in a net *benefit* to the environment by an order of magnitude of 1 1/2 to 1. The Corps found that Pyramid's proposal would result in a more efficient, functioning wetlands that would actually clean the water entering it, provide meaningful fisheries habitat, and provide for rarer and more endangered wildlife." (Emphasis in original.)

EPA's market entry theory, however, totally ignores this balancing analysis and gives no weight to water or wetlands protection. Instead a developer will be denied a permit on a specific site if a practicable alternative site was available at some time previous to his application for a Section 404 permit, a time undesignated by EPA, during which he had some inkling of developing that particular site or his predecessor had some inkling. But as Judge Pratt indicates, this theory does not protect the biological integrity of the waters, the swamp, or the land. Instead, this theory only punishes the present developer by denying him a Section 404 permit. Yet any future developer who has had no privity with the present developer, and was not looking for a site to develop at the time any practicable alternatives were available, could now develop the property under the market entry theory and obtain a Section 404 permit to do exactly what Pyramid proposed to do. This result is a distortion of the goals of the Clean Water Act. Clearly, what EPA has developed is not a means to promote water quality, but a scheme to stop development and growth. What will happen, of course, is that businesses which need to anticipate costs

to operate profitably won't be able to with the unpredictable standards of the market entry theory. As a consequence businesses may avoid an area like Attleboro and as a result, degraded eyesores like Sweedens Swamp, which provide no benefit and serve merely as breeding grounds for mosquitoes, won't be cleaned up, and wetlands enhancement and improvement won't occur. The Court must not allow such an unintended consequence to go unreviewed.

II

THE SECOND CIRCUIT'S DECISION SANCTIONING A STANDARDLESS MARKET ENTRY APPROACH TO THE IMPLEMENTATION OF 40 C.F.R. § 230.10(a) DESTROYS PROPERTY RIGHTS

Farmers, ranchers, miners, and developers, indeed all people who seek to put even their marginal wetlands property to productive use are jeopardized by the Second Circuit's *Bersani* decision. Even though states such as California, Oregon, and Washington have significant land masses which have been or could be classified by the Corps of Engineers and EPA, rightly or wrongly, as wetlands, the best classic example of this jeopardy can be found in Alaska.

Over 70% of Alaska is "wetland," by EPA's definition, even though the arctic gets less rain than California's Mojave Desert. In the arctic's brief summer the land is spotted with bogs because the snows of the preceding winter melt all at once and a subsurface permanent layer of ice covered permafrost prevents both drainage and absorption. Substantially all Alaskan land is owned by other than conventional private ownership. The federal

government still owns 60%; the state government owns or will own (after its selection process is complete) 28%; the native corporations will eventually own nearly 12% with the small residue in private ownership.

Thus, in Alaska, virtually any private or Native land sought to be developed has a very good chance of being characterized as wetlands. If EPA's interpretation and enforcement of its market entry theory is not overturned, there is an equally good chance that this same land will be met with a virtually insurmountable barrier to productive use, and once again Native land will bear the brunt of an antidevelopment ethic.

Despite the fact that Congress approved and ordered the transfer of 44 million acres to Alaskan Native corporations in settlement of their aboriginal rights, the Native use of land has repeatedly been stopped. For example, Shee Atika, Inc. (Shee Atika), an Alaska Native village corporation, selected 23,000 acres in the southwest portion of Admiralty Island. Environmental groups (Sierra Club, etc.) opposed any use of this land. In an effort to compromise, Shee Atika agreed to exchange its land on the southwest of the island for land on the northwest which was rated environmentally less sensitive by the United States Forest Service. Congress approved the exchange. Alaska National Interest Lands Act (ANILCA), Section 506(c), 94 Stat. 2371, 2409; history reviewed in *City of Angoon v. Hodel*, 803 F.2d 1016, 1018 n.1 (9th Cir.), *cert. denied*, 108 S. Ct. 197 (1984). But when Shee Atika applied for a Section 404 permit for a log transfer facility the legal battle began, eventually going twice to the Ninth Circuit.

The argument before the Ninth Circuit was that the practical alternatives the Corps of Engineers was required to consider prior to issuing any permit included *any land* Shee Atika could exchange its own land for! Even though all the land available for exchange was owned by the federal government and would have required congressional approval, the federal District Court considered that a "practical alternative." In reversing the District Court, the Ninth Circuit held that in selecting alternatives to the applicant's proposal the pertinent regulations require the Corps to consider the applicant's purpose and not just a broad generic public purpose. *Id.* at 1021; *see also* 33 C.F.R. § 230, Appendix B(11)(b)(5)(b). Holding that it was error to make a "broad social interest" the exclusive purpose and need, the Ninth Circuit stated that "when the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved." *Id.* at 1021.

This decision, *City of Angoon v. Hodel*, is applicable to the facts in *Bersani* but is in direct conflict with the Second Circuit's *Bersani* decision. The *Angoon* case discourages soothsaying and "endless speculation." It also directs the permitting agency to apply the purpose of the statute to the project *as proposed* by the applicant. The court ruled that the scope of alternatives the applicant must consider need focus only on the safest, cleanest way to accomplish applicant's purpose which was to remove logs from Admiralty Island. *Id.* at 1021. On the other hand the *Bersani* case requires the Corps not only to investigate as viable alternatives any land available at the time of the permit application but also any land that was

available when either the applicant or his predecessor in title entered the market. Thus endless speculation is sanctioned. The case also sanctions eliminating from consideration development designs and wetland mitigation measures which promote the Section 404 goal of protecting the nation's waters by ignoring the project parameters of the Section 404 applicant.

In Alaska, the *Bersani* ruling may mean that all of Alaska must be considered an alternative site. If the State of Alaska needs to apply for a Section 404 permit, the state entered the market first in 1958 (when it was born as a state) and it could have chosen land in any area not specifically reserved by the federal government. The same argument would apply to Native corporations and the results would be the same. Development would *not* occur until alternatives back to the time of selection are evaluated and proven not to be practicable. And make no mistake about it, many special interest groups would seize upon this market entry theory and use it not to keep the nation's water clean, but to stop growth of any kind.

As a specific example, the market entry theory could be employed by opponents of placer mining. A placer miner works in the general vicinity of streams, and thus is usually working within wetlands areas. For the last few years the placer mining industry in Alaska has been defending a number of lawsuits to shut down placer mining. Armed with a new interpretation of 40 C.F.R. § 230.10(a), it takes very little imagination to think of the next legal attack on placer miners. The argument will be that when a miner began exploring (some have been at it for decades) there were thousands of acres of uplands where gold could have been and in fact has been found.

The miners' opponents will probably argue that uplands were, have been, and are practicable alternative mining sites to stream side sites and consequently, no Section 404 permits should issue per 40 C.F.R. § 230.10(a). Such a result, while it may seem attenuated and outlandish, is really no more so than the *Bersani* result, and may be even less so. In Alaska there are at least alternative sites. In *Bersani*, when the Section 404 application was made, there were no longer any alternative sites, yet Pyramid was denied its permit.

The extrapolation of *Bersani* need not stop here either. Consider the farmer who purchased a farm 30 years ago, part upland acreage and part wetland acreage. After years of letting the wetlands lie fallow, even if economics now require that he farm it, he will be told that he need not bother to seek a Section 404 permit. Why? Because there undoubtedly was upland farming land for sale and available when he bought his wetlands.

Obviously such a standard, which would then allow a new farmer to apply for the Section 404 permit if he purchased the original farmer's wetlands, is illogical and not within the contemplation of the Clean Water Act. Moreover, this interpretation of 40 C.F.R. § 230.10(a) defies common sense. As Judge Pratt recognized it "approaches a sensitive environmental problem through a time warp . . . ignores the statute's basic purpose, and . . . creates unfair and anomalous results." *Bersani*, 850 F.2d at 48. Congress would never have intended such a result and to attribute such intent to Congress is legal error which demands correction.

CONCLUSION

EPA's new market entry theory reinterpreting the practicable alternatives test of 40 C.F.R. § 230.10(a) doesn't make sense. In the context of this case the theory does not protect wetlands. Any new developer without a relationship to Pyramid will be entitled to a Section 404 permit for the Sweeden's Swamp site. In the context of achieving the Clean Water Act's goal of cleaning up the nation's waters, EPA's theory achieves no cleanup but rather substitutes a goal not of stopping wetlands damaging development, but of stopping a particular developer's development. In the context of the broad precedential effect that the Second Circuit's approval of EPA's theory will have, wetlands property owners everywhere will be faced with uncertainty and unpredictability as to what point in time they must show no practicable alternatives exist. Such unreasonable speculation will be required regardless of how much wetlands protection, enhancement, or even creation is agreed to by the property owner to ensure clean waters. Thus farmers, ranchers, miners and developers alike will not know what standard they must meet to obtain a Section 404 permit. This is clearly an unfair, amorphous, and arbitrary regulatory standard which will result in the destruction of private property rights.

The petition for writ of certiorari should be granted.

DATED: January, 1989.

Respectfully submitted,

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No. 88-902

(9)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL and the PYRAMID COMPANIES,
Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

and

No. 88-929

JOSEPH ROBICHAUD and CITIZENS IN SUPPORT OF ATTLEBORO MALL,
Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF THE AMERICAN ASSOCIATION OF PORT AUTHORITIES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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25P

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Association of Port Authorities ("AAPA") respectfully moves to file the annexed brief as Amicus Curiae in support of the Petitioners. Consent to file the brief has been obtained from the attorneys for the Petitioners, Bersani, et al.; Department of Justice, Land and National Resources Divisions and the Solicitor General of the United States. The consent of the attorney for Intervenor-Respondent, Sierra Club, was requested but refused.

As demonstrated more fully in the annexed brief, AAPA supports EPA's goal of protecting wetlands. The policies and programs of AAPA and its individual members recognize the vital role that wetlands play in maintaining the balance of our regional and global ecosystems, and the urgent need to preserve, maintain and enhance this fragile and invaluable natural resource. The objective of AAPA and its individual members is to work cooperatively with and assist the EPA and Army Corps of Engineers in assuring the proper treatment of wetlands while at the same time balancing the need for development to meet the growth requirements of this Nation.

Therefore, AAPA requests leave to file this brief in an effort to bring to the Court's attention the need for reviewing the decision of the Second Circuit which it believes fails to promote a workable scheme that would balance the need to protect wetlands and to accommodate the demands of growth and development.

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No. 88-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL and the PYRAMID COMPANIES,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

and

No. 88-929

JOSEPH ROBICHAUD and CITIZENS IN SUPPORT OF ATTLEBORO MALL,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF THE AMERICAN ASSOCIATION OF PORT AUTHORITIES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

By leave of Court, the American Association of Port Authorities ("AAPA") files this brief as Amicus in support of the Petitioners.

I.

INTEREST OF AMICUS CURIAE

The American Association of Port Authorities is an association which represents virtually every United States port agency. The AAPA currently has 84 United States members all of which are public entities mandated by law to serve public purposes, primarily the facilities of waterborne commerce and the consequent generation of local and regional economic growth.

The goal of AAPA and its individual members is to promote the growth and development of our Nation's ports so as to enable this Nation to maintain and enhance its status in trade and commerce among nations. At the same time AAPA recognizes the equal importance of protecting the waters of this Nation, and in particular its wetlands, to preserve and enhance the well being of the environment and its finite natural resources. Therefore, AAPA believes that well-defined substantive standards must be established by the EPA detailing the basis upon which decisions will be made to permit or disallow development in wetlands or areas which may impact upon wetlands. These standards should be developed in a reasoned and just manner by first soliciting input from the members of the regulated community whose individual structures and functions inherently represent a wide range of concerns.

The decision of the Second Circuit has broadened the 'market entry' theory used by EPA in the instant case by stating that it was the only reasonable interpretation of the regulations, *Bersani v. Robichaud*, 850 F.2d, 36, 44 (2d Cir. 1988). Thus, it appears that the Second Circuit is stating that the 'market entry' theory must be used by EPA with respect to all members of the regulated community. Therefore, the decision in this case will have a direct and substantial effect upon AAPA members.

The members of AAPA are public ports and as such have a dual role, acting both in a governmental and proprietary capacity. On the governmental side, ports and their governing boards or commissions are intimately involved with zoning, master planning and related activities. They act as the local sponsors of dredging projects, develop water dependent or related facilities of commerce and promote the development of commerce for those regions which they represent, all pursuant to legislative mandate from the governments which created them. In some instances the governing bodies of ports serve as the local Coastal Commission under the applicable state Coastal Act. In their proprietary capacity, ports engage in strategic planning, marketing, operations and related activities. From both the perspective of ports as governmental and proprietary entities, their involvement in planning for growth is continuous and perpetual, and thus any attempt to apply EPA's 'market entry' theory to them would be an anomaly.

In addition, ports are limited geographically in their sphere of activity to their statutorily defined districts or other legally circumscribed boundaries. Therefore, even the determination of availability of alternative sites on a 'market entry' date would have no meaning under EPA's standardless and geographically amorphous 'market entry' theory. Moreover, since many port authorities have been granted by statute the authority to exercise the power of eminent domain in order to acquire private property within the port district, the decision of the Second Circuit regarding 'market entry' could force EPA to conclude that ports always have alternative sites available, unless the port could show that all other sites within the port district were environmentally more sensitive than the proposed site. This too would be an anomalous result, and a near impossible burden for ports to meet.

II.

STATEMENT OF THE CASE AND INTRODUCTION

AAPA adopts the Statement of the Case in the petition filed by Petitioners, Bersani, *et al.*

Essentially AAPA believes that EPA acted ultra viresly in rendering its decision in the matter *sub judice* insofar as it is intended to set a standardless 'market entry' policy, and that its action was beyond the scope of its authority as defined in Section 404(c) of the Clean Water Act ("CWA") such that it renders the language of that Section meaningless. EPA's action did not amount to a disallowance of a permit as contemplated by Section 404(c), but rather was tantamount to deciding that an entity, in this case Petitioners, was not eligible to apply for a permit in the first instance. EPA concluded that at the time of Petitoners' 'market entry' (a time fixed in retrospect by EPA completely without the benefit of any standards to guide itself, the Army Corps of Engineers ("COE") or the regulated community), there was an alternate site available to Petitioners. Thus, EPA's decision was a threshold determination which could have been decided by the Agency in the first instance without the need for the review of COE's decision to grant the permit as contemplated by Section 404(c). Therefore, whether or not EPA's decision to disallow the permit was factually correct in this particular case, it must not rely generally on Section 404(c) as authority for its action because Section 404(c), by EPA's action in the absence of previously articulated standards, would then be rendered meaningless. Thus, EPA must have acted beyond the scope of its authority, unless it can point to another section of the Clean Water Act which gives it such authority. The discussion in this brief, however, will show that authority for EPA's action cannot be found in the Clean Water Act,

and in fact its action is in contravention of Section 101(a) and (f) of the CWA and EPA's own regulations and guidelines. Therefore, even if EPA's discretionary powers were deemed broad enough to permit its action in this case, it surely could not justify such actions as a general policy.

Most importantly, AAPA believes that the decision by the Second Circuit, insofar as it sanctioned EPA's final determination and broadened its applicability by stating that "a common-sense reading of the statute can lead only to the use of the market entry approach used by EPA," 850 F.2d at 44, constitutes an infringement upon the due process rights of all members of the regulated community who will be deprived of the use of their property, since they were given no opportunity to respond to this broad judicially made rule. Although it is true that EPA had the benefit of a record which included input from the Petitioner for its decision in this controversy, EPA's decision could at best be limited to the facts of this case. However, the Second Circuit has sought to broaden EPA's determination, and by means of the above-quoted language seeks to apply the 'market entry' theory to the entire regulated community which has never had an opportunity to submit any information to assist EPA or the Court in reaching a decision which will profoundly affect their property interests.

Underlying all of this, AAPA believes that the 'market entry' theory as a general policy, devoid as it is of standards, will not serve the purpose of the Clean Water Act with respect to wetlands, since application of it will not foster the goal of wetlands protection.

III.

ARGUMENT

A. THE EPA ACTED BEYOND THE SCOPE OF ITS AUTHORITY UNDER SECTION 404(c) OF THE CWA BY ITS RETROACTIVE APPLICATION OF A 'MARKET ENTRY' THEORY

The Clean Water Act at Section 404(c) grants to EPA the power to disallow the issuance by COE of a permit whenever it determines that an activity would have certain unacceptable adverse environmental effects as specifically enumerated in the Statute. Section 404(c) clearly does not authorize EPA to make a threshold decision that an applicant cannot qualify for a permit due to its 'market entry' date whether or not granting of such would have otherwise unacceptable adverse environmental effects. In the instant case, this is what EPA has done, thus, effectively ignoring the language of Section 404(c) and treating it as if it had no meaning.

The basis upon which EPA decided to apply the 'market entry' theory to the Petitioners, and the means used to determine the point in time when EPA chose to apply it, were unknown to Petitioners and the COE since EPA had apparently not employed the theory in the past to evaluate when the availability of alternative sites would be determined and had set no standards to guide itself, the COE or the regulated community.

It is only too obvious that if such discretionary, retroactive veto powers were contemplated by Section 404(c) there would be no need for the COE and the applicant to go through the administrative process of seeking the permit to begin with since the decision EPA has made could have

been made before any lengthy environmental evaluations and related application procedures were undertaken. The 'market entry' test, requires only that an adverse environmental effect be present, and a determination by EPA that there were practicable alternative sites available on the date of 'market entry', which would then, according to EPA, make the adverse impact unacceptable. Thus, EPA's Section 404(c) veto power would become meaningless and unnecessary under such circumstances since EPA could render its decision in the first instance. The veto power would only be applicable where an applicant had first passed the EPA 'market entry' test since then it would be worthwhile for the applicant to further explore the possible eligibility of its project for a permit. Were this situation known to the applicant and COE in advance, the permit application process would, in many instances, likely not be undertaken. However, in order for the applicant to decide whether it is prudent to apply for the permit, there must be standards established by EPA to give guidance to the regulated community and to the regulatory agencies to ensure that all applicants are fairly treated.

In Section 101(a) of the CWA Congress states that it is a goal of the Statute to restore and maintain the chemical, physical and biological integrity of the Nation's waters; and Section 101(f) states that it is the national policy that procedures utilized for implementing the CWA encourage the drastic minimization of paperwork and interagency decision procedures and best use of available manpower and funds. Clearly the retroactive application of a standardless and previously unannounced 'market entry' test would not be commensurate with either of the goals set forth by Congress in these Sections.

Although an agency is not necessarily precluded from announcing and applying a new standard of conduct by individual, ad hoc litigation which would inherently have

retroactive effect, "such retroactivity must be balanced against the mischief of producing a result which is contrary to the statutory design or to legal and equitable principles." *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1581 (1947).

The goals of Section 101(a) would not be fostered by the 'market entry' test because the test would not serve to protect wetlands in the absence of defined standards. The applicant, failing the 'market entry' test on the basis of the availability to it of alternative sites at some time in the past prior to its application for a permit, could, upon the denial of the permit, sell the property to another developer. Assuming that there were in fact no alternative sites available at the time of the sale, the second developer could pass EPA's 'market entry' test and could, in the absence of other unacceptable adverse environmental effects, develop the wetland. Similarly, a developer who at some time in the past purchased wetland property with plans to build upon it in the future, could pass the EPA 'market entry' test as long as there were no practicable alternative sites available at the time of purchase. However, if there were such alternative sites available at the time of the permit application, the 'market entry' test would not protect the wetland. These hypotheticals are not intended to suggest that other determinations by COE and the EPA would not serve to protect the wetland, but are merely illustrative of the point that there is no reason for a standardless, broadly applied 'market entry' test since such would not serve to protect wetlands, and would not foster the goals of the CWA.

Likewise, the time and energy spent by the COE, other state and federal agencies and the applicant in the application process could, in many instances, be avoided if EPA were to openly establish its 'market entry' theory as policy, and were to provide standards for determining when and

how it would be applied. The goals of Section 101(f) of the CWA to streamline procedures for implementing the CWA surely could not be met by the manner in which EPA has applied the 'market entry' theory.

Although it is an established principle of administrative law that reviewing courts will generally give great deference to the interpretation given a statute by the agency charged with its administration, this principle does not apply when "the agency has misinterpreted its statutory mandate." *Association of American Railroads v. Costle*, 562 F.2d 1310, 1318-1319 (DC Cir. 1977).

The EPA has stated in its Guidelines at 40 CFR 230.1(b) that the Guidelines are intended to be "consistent with and to implement" the policies expressed in the CWA. As illustrated, EPA has not fulfilled this objective by interpreting Section 404(c) of the CWA in such manner as to claim authority thereunder to apply a standardless 'market entry' test to the regulated community. Thus, EPA has acted beyond the scope of its authority under the CWA and in contravention of its own Guidelines. The latter fact is even more poignantly demonstrated by an examination of EPA's most current *Wetlands Action Plan* where one of its seven stated objectives reads as follows: "EPA will work with the Corps to reduce uncertainty and confusion regarding implementation of the Section 404 permit program." *Wetlands Action Plan*, Office of Water/Office of Wetlands Protection at 4 (Jan. 1989). EPA has stated in the Plan that one of the actions it will take to meet its objectives is to: "Use Section 404(c) in advance of individual permit applications to protect significant aquatic resources which are identified through the planning processes." *Id.* at 8.

Thus, the above-quoted language and the text of the Plan seem to indicate that EPA too recognizes the need for

guidance and standards in the administration of Section 404(c). Moreover, it is not clear whether EPA in fact did contemplate that a standardless 'market entry' theory was to apply beyond the confines of the present case. In fact with regard to 'market entry' EPA states as follows in its final determination in this case:

> The issue addressed here relates particularly to circumstances where a developer or developers are entering a market area for accomplishment of a specific project. I need not, and do not, decide here what the relevant time period would be in other circumstances – e.g., where an applicant wishes to build on property inherited or acquired long ago.

Final Determination of the Assistant Administrator For External Affairs Concerning The Sweedens Swamp Site In Attleboro Massachusetts Pursuant to Section 404(c) Of the Clean Water Act, (May 13, 1986). See: Petition of *Bersani, et al.* for Writ of Certiorari, Appendix D, p. 93a, n. 14.

Thus, it is not specifically with EPA's determination in the instant case that AAPA takes issue. It is rather with the language by the Second Circuit in *Bersani*, 850 F.2d at 44, which on its face appears to broaden the scope of EPA's standardless 'market entry' theory so as to approve or possibly mandate the application of it to the entire regulated community. In fact the Second Circuit held that there was no reason for EPA to set standards, for to do so would only "confuse things further." 850 F.2d at 45.

The delegation of authority to an agency is not unbounded, and "it is the duty of a reviewing court to determine whether the course followed ... is consistent with its mandate from Congress." *Atchison, Topeka and Santa Fe Railway Company v. Wichita Board of Trade*, 412 U.S.

800, 805-808, 93 S.Ct. 2367, 2374-2375 (1973). An agency must clearly set forth the grounds on which it acted, and it is the "agency's duty to explain its departure from prior norms" so that the reviewing court can understand first what a decision means and then determine whether it was consistent with the statute. *Ibid.*

AAPA believes that EPA should not be permitted such unfettered discretion as the Second Circuit would allow, and in fact that to permit such would result in EPA's acting beyond the scope of its authority under the CWA. It recognizes, however, that EPA may not have intended such a broad interpretation of its final determination regarding the applicability of the 'market entry' theory, and AAPA takes no position with respect to the appropriateness of the theory as restricted to the case at bar.

B. THE SECOND CIRCUIT'S DECISION MAKES EPA'S 'MARKET ENTRY' THEORY APPLICABLE TO ALL MEMBERS OF THE REGULATED COMMUNITY, THUS HAVING THE POTENTIAL TO DEPRIVE THEM OF FIFTH AMENDMENT RIGHTS

As discussed in *Point A*, the decision of the Second Circuit appears to give approval and perhaps even direct EPA to apply, in its discretion, a standardless 'market entry' test to all members of the regulated community who seek to obtain a dredge and fill permit for proposed activities in a wetland. AAPA believes that the Second Circuit, by its engagement in judicial rulemaking, has thus compounded the error of any intention EPA may have had with regard to discretionary application of a standardless 'market entry' theory.

Certainly before EPA could establish such a broadly applicable policy it would have to allow the regulated

community some measure of due process since properties held by many potential permit applicants would be effectively declared undevelopable by such a ruling. Therefore, the ruling should not be made in the quasi-judicial setting.

Generally an administrative agency should not utilize a single case to promulgate a rule of widespread effect. *Marshall v. Western Union Telegraph Company*, 621 F.2d 1246, 1254 (3rd Cir. 1980). The Administrative Procedure Act ("APA") defines a "rule" as "the whole or part of any agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy..." *Id.* quoting 5 U.S.C. §551(4) (1976). "When an administrative agency attempts to exercise a legislative function delegated to it by Congress, it must do so in compliance with the provision of the APA, 5 U.S.C. §553" which "requires, *inter alia*, notice of the proposed rule to be published in the Federal Register" and the opportunity for interested persons to comment. *Id.* at 1254. The purpose of the notice and comment requirement was to afford an opportunity for the public to participate in the rulemaking process, and to enable the agency to educate itself before establishing a rule and procedure which would substantially impact the regulated community. *Texaco, Inc. v. Federal Power Commission*, 412 F.2d 740, 744 (3rd Cir. 1969). The rulemaking provisions of the APA "were designed to assure fairness and mature consideration of rules of general application," and those provisions "may not be avoided by the process of making rules in the course of adjudicatory proceedings." *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759, 766, 89 S.Ct. 1426, 1429 (1969).

Even when an administrative agency engages in an adjudicatory proceeding involving a concrete factual situation, facts and inferences may be used to formulate legislative-type judgments of prospective operation.

Hoffmann-LaRoche, Inc. v. Kleindienst, 478 F.2d 1, 13 (3rd Cir. 1973). In the instance where the adjudicatory proceeding is thus used for legislative purposes, it must follow the notice and comment requirements of the APA, 5 U.S.C. §553(b). *Marshall v. Western Union Telegraph Company*, 621 F.2d at 1254. In the final analysis, "the ultimate standard" against which the court must "evaluate the fairness of the proceedings is due process of law." *Hoffmann-LaRoche*, 478 F.2d at 12, citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 767, 88 S.Ct. 1344 (1968); *Morgan v. United States*, 304 U.S. 1, 18, 58 S.Ct. 773 (1937).

The Second Circuit, however, without the benefit of any record containing input from the affected parties has, through the mechanism of judicial rulemaking, established the standardless 'market entry' theory as the only reasonable approach for EPA to follow in determining whether or not there are alternative sites available to a proposed project. Therefore, without according to the parties affected by the ruling any due process rights to have their concerns heard, the Second Circuit has set the stage so that many will be deprived of the use of their properties.

A regulatory taking claim in violation of the Fifth Amendment with respect to governmental restrictions on land use requires that a land owner first establish "that the regulation has in substance 'taken' his property — that is, that the regulation 'goes too far.'" *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348, 106 S.Ct. 2561, 2566 (1986), citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160 (1922). Several factors have been identified in an examination of cases to determine whether a regulation has gone too far and these include: "the economic impact of the regulation; its interference with reasonable investment-backed expectations, and the character of the governmental action..." *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390 (1979).

"While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceeding." *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 107A S.Ct. 2378, 2386 (1987) (interim ed.) The application of a regulation to a property effects a taking if the regulation does not substantially advance a legitimate governmental interest or if it, "denies an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141 (1980). The determination of whether there is a substantial advancement of a legitimate governmental interest requires that the regulation be intended to promote the public welfare. *Id.* at 2142. The mere fact that a governmental regulation was intended to promote a public benefit will not suffice. *Loveladies Harbor, Inc. v. U.S.* 15 Cl. Ct. 381, 387 (1988). The determination of whether a taking has occurred must involve a balancing of the intended public benefit against the harm inflicted upon the landowner. *Agins v. City of Tiburon*, 447 U.S. at 261. When the Federal Circuit Court balanced the governmental interest in preserving certain wetlands against the loss in value to the landowner in *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied* 479 U.S. 1053, 107 S.Ct. 926 (1987) (interim ed.), it found the balance in favor of the landowner. The finding was based upon the determination that the "Clean Water Act's preservation of wetlands was not for the prevention of a public harm but rather for the maintenance of a public benefit." *Loveladies Habor, Inc. v. U.S.*, *supra*, 15 Cl. Ct. at 388.

The governmental power to interfere by regulations with the general rights of the landowner by restricting the character of his use of the land "is not unlimited," and "such restriction cannot be imposed if it does not bear a

substantial relation to the public health, safety, morals or general welfare." *Nectow v. City of Cambridge, et al.*, 277 U.S. 183, 188, 48 S.Ct. 447, 448 (1928). Thus, where the 'market entry' ruling would not protect wetlands as was demonstrated in *Point A*, it would be subject to challenge under the substantial interest test. In addition to the taking argument, it has been stated that a regulation which goes too far violates the Due Process Clause of the Fifth Amendment. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 196, 105 S.Ct. 3108, 3122 (1985).

Moreover, the Second Circuit is not the entity charged by Congress with expertise in matters of wetland protection, and yet it has rendered a decision which will have far ranging impacts without the benefit of input or comments even from concerned federal and state agencies whose opinions would be a necessary requirement to the rendering of a reasoned decision in this matter. As discussed in *Point A*, AAPA believes that the 'market entry' theory, as a rule of general applicability, bears no rational relationship to the protection of wetlands and the furtherance of the goals of the CWA.

The federal courts should not purport to adopt "on their own initiative" drastic new rules that "would make major inroads on a policy matter that Congress has reserved for itself." *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 269, 95 S.Ct. 1612, 1627 (1975). The judiciary's rulemaking authority stems from a grant by congressional delegation and this grant is limited by condition that such rules "shall not abridge, enlarge or modify any substantive right." *Marek v. Chesny*, 473 U.S. 1, 34, 105 S.Ct. 3012, 3030 (1985), quoting The Rules Enabling Act, 28 U.S.C. §2072. The test must be whether a rule regulates procedures for the administration of a remedy or operates to abridge a substantive right. *Sibbach v. Wilson & Co.*, 312

U.S. 1, 10, 14, 61 S.Ct. 422, 424, 426 (1941). "While the temptation to engage in judicial rulemaking may be powerful, our Constitution is best preserved by adherence to the proper judicial role." *White House Vigil v. Clark*, 746 F.2d 1518, 1541 (DC Cir. 1984). In a concurring opinion, Justice Fay notes the concern that "judicial rulemaking rarely takes into account the parties expectations, which causes unfairly retroactive rulemaking, and uncertainty in the law." *Georgia Power Company v. Sanders*, 617 F.2d 1112, 1128, n.9 (5th Cir. 1980), *cert. denied* 450 U.S. 936, 101 S.Ct. 1403 (1981).

CONCLUSION

Irrespective of whether EPA intended its standardless 'market entry' theory to apply generally to all members of the regulated community, the decision of the Second Circuit has provided this effect. The decision thus operates as a rule of broad applicability and significant effect. It would not have been proper for EPA to promulgate such a rule in the course of a single quasi-judicial proceeding since such would be beyond the scope of its authority under the CWA, and would not comport with the rulemaking requirements of the APA.

Yet, the Second Circuit, without the benefit of a record including input from the regulated community and the administrative agencies Congress has charged with expertise in wetlands protection, has through judicial rulemaking promulgated the standardless 'market entry' theory as a general rule. Application of this rule has the potential of depriving many members of the regulated community of their property without due process and in contravention of the Fifth Amendment.

In addition, the rule as demonstrated in this brief does not foster wetlands protection, and does not promote a substantial governmental interest. The rule is, therefore, not properly related to the interest sought to be protected. For the foregoing reasons AAPA urges this Court to grant Certiorari to review the decision of the Second Circuit so that a balanced, and reasoned result will be obtained in the area of wetlands protection.

Respectfully submitted,

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